(13)

In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 1036

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
A Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio
and
BRIEF OF PETITIONER.

MATTHEW L. BROWN,
50 East Broad Street,
Columbus, Ohio;
Attorney for Petitioner.

THE GAZETTE LEGAL PUBLICATIONS CO., CLEVELAND, OHIO—MAIN 0447

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of The United States.

Your Petitioner, The State of Ohio *ex rel.* Hugh M. Foster, a taxpayer, respectfully shows as grounds for the issuance of writ of certiorari to the Supreme Court of Ohio:

A.

SUMMARY STATEMENT.

Ohio is a sovereign State of the United States of America. Hugh M. Foster is and was at all times mentioned herein a taxpayer in said state.

Note: Emphasis supplied by italics, or otherwise in this petition is ours unless specially noted.

(R. . .) refers to the Record of the Supreme Court of Ohio.

The Volumes of the Record cover pagination as follows:

Vol. 1—pages 1 to 464, inclusive;
Vol. 2—pages 465 to 904, inclusive;
Vol. 3—pages 905 to 979, inclusive.

The Opinion of the Supreme Court of Ohio appears on pages 953 to 972, inclusive of Vol. 3.

This action was originally filed in the Court of Appeals, Franklin County, Ohio, Case No. 3325, as a mandamus suit, to safeguard the public revenue of Ohio and prevent fraud on the revenue arising from the levy and collection of taxes upon retail sales.

The case was heard upon the second amended petition, the answer and the reply. (pp. 1-9, R. Vol. 1.)

The collections of the Ohio Sales Tax were made by licensed vendors from consumers at rates specified in the statute. Retail vendors of taxable merchandise were required to purchase from the State Treasurer prepaid tax receipts and when a retail sale was made the vendor was required to cancel such prepaid tax receipts covering the correct amount of the tax, keep one part and deliver the other part to the consumer. This evidenced at the time of the sale, the payment of the tax to the state through the vendor (Sec. 5546-3 G. C.). All such prepaid receipts were redeemable at any time by the vendor for face value (Section 5546-8 G. C.).

The plaintiff therein was the State of Ohio, *ex rel.* Hugh M. Foster, a taxpayer. The defendant was William S. Evatt, Tax Commissioner for the State of Ohio. The plaintiff sought a writ of mandamus to compel the Tax Commissioner to perform a specific duty to make an assessment for "personal liability" as provided in Section 5546-9a G. C. against the Kroger Grocery and Baking Company and against the Great Atlantic and Pacific Tea Company, for deficiencies in accounting for sales taxes levied on taxable retail sales made by them in the year 1935 as shown by sworn reports filed by such vendors and as further shown and found by the audits of the books and records of such retail sales of said vendors *made by the Tax Commission.*

The statute was enacted December 13, 1934—115 O. L. Pt. 2, Page 306, and was originally known as G. C. Ohio Sections 5546-1 to 17 inclusive, but now known as Sections

5546-1 to 24c inclusive, and the object and purpose of the Act as set forth in the title thereto and in Section 5546-2 is "The levy and collection of a tax upon sales of personal property at retail * * * for the purpose of public revenue, * * * poor relief, schools and local governments."

The rates were specified in Section 5546-2 G. C. as follows: 1 cent if the price is 40 cents or less; 2 cents if the price is between 40 cents and not more than 70 cents; 3 cents if the price is more than 70 cents and not more than $1; if the price is less than 9 cents, no tax shall be imposed, i.e. no tax shall be collected from the consumer; *if the price is in excess of one dollar, three cents on each full dollar thereof.*

It was provided that the tax shall apply and be collected from the consumer by the vendor when the sale is made.

In the same section there were enumerated several transactions numbered one to ten inclusive to which the tax did not apply. None of these exemptions are involved in this cause.

To enable the Tax Commission to effectually "administer and enforce the provisions of the Act" as provided in Section 5 and Section 9a, Section 2 further provided:

> "For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

This section of the act was enacted to aid the Commission in enforcing each and all the provisions of the act including Section 5546-9a G. C. and to prevent evasions and frauds of vendors of taxable merchandise and was particularly applicable in the case of vendors who did not keep accurate records of sales as required by Section 5546-12 G. C. and who became personally liable under Section 5546-9a G. C.

This presumption was further enacted to enable the Tax Commissioner within the limits, standards and policy fixed in the statute to establish classifications under a rule and regulation of the Commission, promulgated as hereinafter alleged for the purpose of enabling the Tax Commissioner to assess the amount of personal liability established in Section 5546-9a G. C., following the rule laid down in *Jones vs. Brim*, 165 U. S. 180, 183-184.

Section 5546-12 provides that:

> "Each vendor shall keep such record of sales together with invoices, bills of lading, retained parts of cancelled prepaid tax receipts, and such other pertinent documents, in such form as the commission may by regulation require."

Section 5546-5 provides for the Tax Commission procuring the prepaid tax receipts. Section 5 further provides that:

> *"The Commission shall enforce and administer the provisions of this act * * *. It shall have power to adopt and promulgate such rules and regulations as it may deem necessary to carry out the provisions of this act * * *"*

To enable the Tax Commission to more effectually "enforce and administer the provisions of the act" as enjoined in Section 5, Section 5546-9a, further provides:

> "In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be *personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.*
>
> *"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. * * *"*

The same section then provided that "*the amount*" *so assessed,* "*together with a penalty of fifteen per centum thereof*" shall be due and payable from the vendor to the Treasurer of State within 15 days after service of notice upon such vendor of such assessment and when payable shall draw 12 per cent interest per annum.

The vendor is given the right after such notice to petition for re-assessment and after action upon such re-assessment, *the vendor was given the right to appeal to the Court of Common Pleas.*

None of these sections have been repealed or changed so far as it relates to the duty, rights, power and obligations of any vendor, the consumer, or the Tax Commission, under Sections 5546-2-3 and 5 or as it established the personal liability of the vendor thereunder as fixed by Section 9-a. (See Evatt Testimony, pp. 539-540, Vol. 2 R.)

It is contended by petitioner that this tax law is complete in all of its essential parts, so far as it relates to the primary power delegated to the legislature; that the policy of the law is established; that the standards, duty, liability and obligation were established; that the principles governing administrative action are established; that full and complete power is lawfully delegated to the Tax Commissioner to protect the public revenue and insure an honest, accurate and full accounting for all taxes levied and collected.

The Commission did adopt rules and regulations in 1935, part of which were Plaintiff's Exhibit No. 1, (p. 294, Vol. 1 R.) and an auditor's field manual, Plaintiff's Exhibit No. 2 (p. 295, Vol. 1 R.), which were issued to all officers and employees of the Tax Commission. (Exhibit No. 2 contained Section "F" which designated the procedure for auditors and inspectors to follow in auditing the business, books and sales of a vendor for the purpose of securing "information" upon which to make an assess-

ment.) This auditing procedure was never withdrawn, as stated by the court, just abandoned as alleged herein.

The rules and regulations and field manual do not in any sense affect the substantive provisions of this tax law, but on the contrary were formulated as methods of fact finding to discover evasions of the law and fraud on the part of vendors. *The rules themselves were based upon fact finding* and were the result of the efforts of statistical experts in the Tax Department, spot checks of the daily business of various classes and types of vendors and by investigation and inspection of monthly reports of vendors. It was found upon such study that large grocery chain stores to which class the Kroger Grocery and Baking Company and the Great Atlantic and Pacific Tea Company belonged showed that such chain stores should collect and cancel prepaid tax receipts a sum equal to 3.30 per cent of their taxable retail sales. (pp. 583-585, R. Vol. 2.) The head of the Sales Tax Division testified the enforcement of this percentage rate resulted in producing records, which vendors had concealed. (pp. 586-587, R. Vol. 2.)

The cause in the Court of Appeals on March 25, 1942, was referred to Former Chief Justice of the Supreme Court of Ohio, Carrington T. Marshall as Special Master Commissioner, with all the powers of a Referee in Chancery. (pp. 20-21, R. Vol. 1.)

In the Court of Appeals, the Tax Commissioner was represented by Attorney James N. Linton, a prominent politician, who was appointed as special counsel without pay, by the Attorney General to represent the Tax Commissioner Evatt in that case. Attorney Linton had been attorney for the Great Atlantic and Pacific Tea Company in an earlier case in the Supreme Court, Case No. 27,500, involving the same facts but not the same legal issues.

The Master Commissioner (pp. 835-896, R. Vol. 2) filed his report with findings of fact and conclusions of law with the Court of Appeals, December 8, 1942.

The finding and judgment of the Court of Appeals (pp. 23-26, R. Vol. 1), confirmed the finding and conclusions of law of the Master Commissioner, and it was the judgment of that Court that the information in the possession of the Tax Commission covering 1935 sales showed that the A. & P. Company was personally liable in the sum of $235,152.90 together with a 15 per cent penalty computed on a basis of 3 cents on each full dollar of taxable retail sales, that the Kroger Grocery and Baking Company was personally liable in the sum of $143,140.96 together with a 15 per cent penalty for the period from January 27, 1935, to September 7, 1935, computed on a basis of 3 cents on each full dollar of taxable retail sales; that the Commission in the lawful exercise of power delegated to it had adopted a valid rule and regulation based upon research and fact finding that such grocery chain stores should collect on their taxable retail sales and cancel prepaid tax receipts amounting to 3.30 per cent of their taxable sales; the Tax Commissioner was ordered to make an assessment based upon such information and give notice thereof to each of said vendors and thereupon sustained the prayer of plaintiff's second amended petition. (See pp. 67-68 Appendix.)

Not a single witness was produced by the Tax Commissioner to dispute any of the facts contained in said reports or audits or the facts as found by the Master Commissioner and the Court of Appeals.

Thereafter said Tax Commissioner resisting the order of the Court of Appeals, represented by said Linton, appealed from the judgment of the Court of Appeals to the Supreme Court of Ohio on questions of law. The record shows that other attorneys for Kroger and A. & P. were constantly present at the hearings before the Master and counseling with the special counsel.

Said appeal was heard on the 21st day of March, 1944, and decision rendered August 9th, 1944 (pp. 906, 908, R. Vol. 3.)

When this case was called for hearing on the merits on March 21, 1944, Justice Hart, having theretofore informed the court of some interest in the case, retired from the bench without further words or explanation. Justice Turner then arose to his feet with books and papers in hand and stated, in substance, that he did not believe he should sit in this case as he was a lessor to the Kroger Grocery and Baking Company, one of the chain store corporations, affected by the issues in this case, and that his rent was collected on a percentage basis of the monthly gross receipts. (See affidavit relator, p. 926, R. Vol. 3 and p. 974, R. Vol. 3.) It was alleged in relator's affidavit that Judge Turner had another lease on a percentage rental to another department store, the R. & S. Dime Stores. Judge Turner did not disclose this fact.

In fairness to Judge Turner, it must be said that he filed an affidavit (p. 920 and p. 930, R. Vol. 3) in the case explaining in some detail the terms of his lease to the Kroger Company but he did not gainsay the fact that that lease was on a percentage basis, and this record shows that all the taxes which were illegally withheld by the Kroger Company augmented the gross receipts of that company upon which Judge Turner's percentage was calculated. In Judge Turner's affidavit he made no denial relative to the R. &. S. Dime Store lease.

Judge Turner's affidavit is at once an admission of interest in the controversy and a confession of his prejudice. His affidavit should be analyzed. In the second paragraph he admits:

> "Affiant's lease to the Kroger Grocery and Baking Company and subsequent renewals thereof provided for a percentage rental based on gross sales which were payable *without any deductions for taxes of any kind.*"

In the same paragraph Judge Turner predicates his affidavit upon the principal point in the entire controversy wherein he says there is no evidence of the collection of

taxes for which the vendor failed to account. It is in the 6th paragraph that Judge Turner confesses his interest. We quote:

> "Said lease provided for a flat rental plus a percentage of the annual gross retail sales in excess of a stated amount. In such lease it was provided that certain painting, altering and remodeling were to be made in the leased premises at the expense of lessor and that lessee was to advance sufficient funds therefor. Such funds were to be repaid by merely withholding any and all percentages of excess rental but with the provision that if such percentages were not sufficient to liquidate the cost of such painting, altering and remodeling, the unpaid balance should be cancelled and the lessor released from further liability thereon."

It is thus admitted that the altering and remodeling was to be done by the lessor, and it follows that the altering and remodeling increased the value of the premises by the amount of the cost thereof.

The affidavit further states in Paragraph 6 that:

> "Painting, altering and remodeling had cost the sum of $2174.66 which amount was $906.48 in excess of the percentage rentals earned * * *."

Surely it can make no difference whether the percentages which were payable to Judge Turner were more or less than the cost of the alterations. It does appear, however, that even for the fraction of the year 1935 from July 18th to December 31st Judge Turner's percentage amounted to $1268.18, being the difference between the total costs of the improvements and the amount of percentages which was agreed upon as being in excess of the minimum flat rental.

Taking Paragraph 6 in conjunction with Paragraph 7 of the affidavit, we find that it is apparent that Judge Turner seeks to draw a distinction between "possible financial interest" and benefits by reason of improvements to his building, paid for out of those percentages. It will be

observed that in Paragraph 7, it is stated that he was "clearly of the opinion that he had no possible financial interest in the outcome of the case." It must be borne in mind, however, that the judgment entered in this case by the Supreme Court of Ohio is such as to foreclose any inquiry into the shortcomings of the Kroger Grocery Company during all the years subsequent to 1935. By erroneously declaring that the burden is upon the State of Ohio to prove specific sales, and it being admitted that the Kroger Company kept no record of specific sales, the Kroger Company is permitted to make a profit out of the sales tax of the entire excess over 2.50% for the years 1935 and 1936 and the entire excess over 3% for all subsequent years, upon all of which excess Judge Turner receives 5%.

The issue of Judge Turner's disqualifying interest and the denial of due process of law and the equal protection of the laws under the 14th amendment in rendering the decision and judgment in the Supreme Court was raised by application for rehearing (Paragraph 8, p. 920, R. Vol. 3) and also on motion to vacate the judgment (p. 973, R. Vol. 3 and p. 923, R. Vol. 3) on the ground of his interest but the application for re-hearing and the motion to dismiss were both overruled November 22, 1944 by the court with Judge Turner's concurrence. (pp. 907-909, 910, R. Vol. 3.) The action of the Court on the motion was set aside. (p. 910, R. Vol. 3.) The motion was again overruled December 20, 1944. (p. 910, R. Vol. 3.) Applications for rehearing in the Ohio Supreme Court can only be argued on brief. The Attorney General's office by special counsel Linton filed a brief in which they also sought to make the point that objection to Judge Turner was not timely made. The answer to this is first, that the case was heard on its merits out of the regular order, and the counsel who signs this petition and who was the principal counsel in the case, had not yet arrived in the courtroom and knew nothing about Judge Turner's admission of his disqualification. Petitioner was

not consulted (p. 927, R. Vol. 3.) Second, the action of the Supreme Court raised the opportunity to raise the question. Third, the relator representing the State and the interest of several million taxpayers in Ohio in a suit to recover for the State taxes unlawfully withheld would have no right to waive the disqualification of a judge. Fourth, that the interest of Judge Turner was pecuniary and continuing each and every year since 1935, and the disqualification was based on public policy. The decision and judgment thereon affect the current every-day administration of the act. Fifth, no disclosure was made of the lease to R. & S. Dime Stores at the hearing. Sixth, there is no waiver or estoppel of record here, but Judge Turner did admit he had a percentage interest in the gross receipts of Kroger. The amount is affected by his conclusions. Under such conditions it is difficult to get a correct record. *Gregory v. Railroad,* 4 O. S. 678.

Evatt, Tax Commissioner, testified (p. 842, R. Vol. 2) that the State has no remedy against a licensed vendor who does not keep records of specific sales, to compel him to account for taxes levied and collected under Sections 2, 3, 5 and 9-a.

In so holding Mr. Evatt has ignored Section 5546-2 which declares a presumption of taxability.

Upon the same point the Ohio Supreme Court has declared as its third syllabus:

> "Where a specific retail sale of tangible personal property is shown to have been made by a vendor during the year 1935, such sale is presumed to be subject to the tax levied by Section 2 of such Sales Tax Act and the burden of proof to establish the contrary is upon the vendor."

It is plainly apparent that Judge Turner has entirely missed the point in the application of this section relating to presumption. Manifestly there is no occasion to apply the presumption where proof is made of "a specific retail sale of tangible personal property," and it is apparent

that the Legislature intended that the burden should be placed upon the vendor in all cases where by reason of the failure to keep records of sales as provided by Section 5546-12 it becomes impossible for the Tax Commissioner to check the accuracy of the vendors' reports. Judge Turner, 144 O. S. p. 102, 56 N. E. Rep. (2nd) p. 281, pars. 8-9, (p. 968, R. Vol. 3), said *"The record does not disclose the making of any taxable sale."*

The sworn reports of these vendors and the audits of the Tax Commission disclose the making of millions of dollars of taxable sales, which are admitted and not disputed. It was the contention of the plaintiff that if each specific sale was proved the law applied the rate automatically and it would not be necessary to use the presumption enacted to prevent the evasion of the tax, 144 O. S. 65, 66, 56 N. E. Rep. (2nd) 266 (p. 953, R. Vol. 3), first and third syllabi. The dissenting opinion opposed this theory. (p. 971, R. Vol. 3.)

The key position of Judge Turner in the final adjudication of this case in the Ohio courts is shown by the fact that this case was first heard by Carrington T. Marshall appointed by the Court of Appeals as a Master Commissioner with all the powers of a Referee in Chancery. Mr. Marshall was a former Chief Justice of the Ohio Supreme Court and his standing as a jurist was very high.

A large volume of testimony was taken before him, and he made comprehensive findings of fact and conclusions of law, which findings of fact and conclusions of law on review by the full Court of Appeals and upon comprehensive briefs and lengthy oral arguments were approved and confirmed by unanimous vote of the Court of Appeals consisting of three judges. The case was appealed to the Supreme Court and in that court the opinion was written by Judge Turner, concurred in by three other judges, making a bare majority of the court. Two judges, Zimmerman and Williams, wrote a strong dissenting opinion. As the matter stands there-

fore there were six judges of the opinion that the assessment should be levied and four judges including Judge Turner were of a different opinion.

Tax Commissioner Evatt, the defendant in this case, was unwilling to levy a deficiency assessment against these two vendors which would have had the effect of putting the burden upon those vendors to establish the correctness of their tax returns as contemplated by the statute, Sections 5546-2 and 5546-9a, thereby enabling the state, upon a hearing to present further evidence of the liability of such defaulting vendor as contemplated by Section 5546-9a. This burden was held by the dissenting opinions in the Supreme Court to properly rest upon the vendors.

Evatt appealed from the adverse judgment in the Court of Appeals to the Supreme Court, although Justice Turner when Attorney General, O. A. G. 1927. R. p. 689, No. 397, held that "when a Court makes an order against an administrative officer, he must obey the order, and has no authority to question its legality," notwithstanding a contrary opinion of the Attorney General.

The Attorney General went before the referee and testified that he made the appointment of Mr. Linton in writing and stipulated that Mr. Linton was to receive nothing from the State of Ohio for his services (pp. 645, 647, 650, R. Vol. 2), Plaintiff's Exhibit No. 33. The Attorney General said he saw no conflict between the interests of the state herein and the interests of Kroger and A. & P. (pp. 650-655, R. Vol. 2.) This record does not show whether the A. & P. Company paid Mr. Linton or whether they even promised to do so. Mr. Linton refused to answer questions on that matter. (pp. 32-35, R. Vol. 1.) Surely the presumption prevails that he did receive a proper compensation from the A. & P. Company and possibly the Kroger Company. It was stated in the application for rehearing in the Supreme Court that A. & P. and Kroger were to finance or did finance the defense in the Court of Appeals

and the prosecution of the appeal, p. 27 Second Supplemental Application for Rehearing. (Page 994 original record.) That statement was not denied. The Attorney General collaborated with the attorney for A. & P. in preparing the answer and defense in the Court of Appeals. (p. 566, R. Vol. 2.)

In making the appeal the Tax Commissioner was required to print all of the oral testimony taken before the referee and also the report of the referee and the brief of Mr. Linton. The printing bill for printing the record alone was $1500.00. A voucher was presented to the State Auditor of Ohio therefor and the Auditor at first refused payment, but was later compelled by mandamus at the suit of the Attorney General to pay same.

This cause was argued orally before the Supreme Court of Ohio on March 21, 1944, and although the issues were within comparatively limited range, a final judgment was not announced until August 11, 1944.

The record shows the defense in the Court of Appeals and the prosecution of the Appeal was not in the interest of the state but of Kroger and A. & P. Gen. Code, Ohio Sec. 336, permits appointment of special counsel by Attorney General only if the interests of state require it. Linton did not represent the state. He was laboring to keep the state from getting its revenue and permitting large vendors, such as his client, who was A. & P., to keep the revenue for which they did not account when they refused to keep records of sales. The Tax Commissioner and special counsel adopted the scheme of defense and justification conceived by Kroger's Tax Lawyer in 1936 (pp. 436-452, R. Vol. 1) when the audit was made. (pp. 115-116, R. Vol. 1.)

The Master Commissioner found that the sworn reports filed by the A. & P. Company and the audits of the books of account of the A. & P. Company showed that the cancellation of prepaid tax receipts of the A. & P. company were only 2.47 per cent of the value of all sales of taxable

merchandise which means that the State of Ohio received only *2.47 per cent* as taxes calculated upon all sales of taxable merchandise *after all legal claims for exemption were allowed*; the Master Commissioner also found that the sworn reports of the Kroger Company and the audits of the books of accounts of the Kroger Company showed that the cancellation of prepaid tax receipts of the Kroger Company were only 2.50 per cent of the value of all sales of taxable merchandise which means that the State of Ohio received only *2.50 per cent* as taxes calculated upon all sales of taxable merchandise *after all legal claims for exemption were allowed*; the Court of Appeals confirmed these findings of the Master Commissioner and the opinion of Judge Turner in the Supreme Court in reviewing the judgment of the Court of Appeals also confirmed that finding—See 144 O. S. at page 107, 56 N. E. Rep. (2nd) 283 (p. 970, R. Vol. 3):

> "*The record here shows* and the Special Master Commissioner found that the A. & P. cancelled stamps in approximately 2.47 per cent of claimed taxable sales, while Kroger cancelled approximately 2.50 per cent of claimed taxable sales."

Under the law on the record the lowest percentage of sales tax is that which is levied upon a 40 cent sale upon which the tax is one cent. *By a simple mathematical calculation, it is plain that that tax which is the lowest possible tax is 2½ per cent. See Court of Appeals Opinion pp. 74, 75 appendix.* If every sale made by the Kroger Company was exactly 40 cents it would follow that the Kroger Company has properly accounted to the State of Ohio. On the other hand if there was a single sale other than for the sum of 40 cents the Kroger Company has defrauded the State of Ohio. See Court of Appeals Opinion (pp. 74-75 appendix).

Turning to the A. & P. Company, there is no possible taxable sale made by that company which would result in as little as 2.47%.

It is contended that these admitted facts demonstrate that this controversy is saturated with fraud.

It conclusively appears from the above quotation from the opinion of Judge Turner that the State of Ohio has been defrauded; that by its judgment and by the reasoning of Judge Turner it does not seek to justify the action of these two vendors, but it permits these two vendors to escape from restoring the fruits of their fraudulent conduct by declaring as a rule of evidence and by improperly placing the burden of proof upon the State of Ohio to prove specific sales, meaning thereby each individual sale of merchandise and to show in connection with each individual sale evidence of failure to deliver to the consumer a proper prepaid tax receipt. It is contended that the fallacy of this reasoning and the unsoundness of this rule of the Supreme Court of Ohio becomes apparent when it is pointed out that these two vendors have together approximately 2,000 stores in the State of Ohio, and that each store has at least one cash register, and some of them many cash registers, and the only possible way the State of Ohio could meet this rule of evidence and the burden of proof thus declared would be to have an inspector of the Tax Commission placed at each cash register during every moment of the entire day of each and every day when those stores were open. It was further contended that while these two chain stores are under investigation in this case there are other chain stores in Ohio and literally hundreds of department stores where the same rule applies, because of failure to obey Section 5546-12 to keep records of sales, and as a result of this entire picture the State of Ohio has been defrauded of many millions of dollars each year.

It is further contended in this connection that this controversy applies only to vendors in Ohio who fail to keep records of sales, although the statute, Section 5546-12, requires *all* vendors to keep records of sales. The failure to keep records is therefore a plain violation of the

statute on the part of chain stores and they are themselves solely to blame that this controversy should arise.

Notwithstanding this showing, Judge Turner, at page 284, 56 N. E. Rep. (2nd) (p. 971, R. Vol. 3), 144 O. S. 108, the opinion, criticized the use of the "average percentage of tax" and criticized the use of "mathematical probabilities" demonstrated by the bracket taxes set out in Section 5546-2 G. C. See Court of Appeals Opinion (pp. 68, 69, 74, 75 appendix).

The Ohio Court of Appeals in adopting and approving the findings set forth in the rules and regulations for audits and making deficiency assessments by the Tax Commission was applying the rule of "*common sense and the experience of men.*" It is contended that the rule laid down in *Mutual Film Company vs. Industrial Commission*, 236 U. S. 230, at page 246, should govern the Court in determining the rights of the parties. It was therein stated by this Court.

> "The terms (of the statute) like other general terms get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct * * *. Upon such sense and experience therefore the law properly relies."

The Supreme Court of Ohio, speaking through Judge Turner in this case, has expressly refused to apply the rule of "common sense and experience of men" and has insisted that nothing can be implied under a tax law as complete as this Sales Tax Act, but that every detail of the *administration* of the Ohio Sales Tax Law must be definitely expressed in the law.

That which Judge Turner was pleased to call *probabilities* are in fact *certainties*.

It was only formulated into a *rule* (authorized by Section 5546-5 G. C.) for auditing the accounts of vendors "for proper administration of this act and to prevent the evasion of the tax" and a means of securing "information" upon which to levy, not a tax, but to establish the amount

of personal liability for the purpose of a *tentative assessment* which would place upon the vendor the duty of requesting a reassessment, which would afford the vendor the opportunity to rebut the "presumption" declared in Section 5546-2 as hereinbefore quoted. There was no exercise of law making power. The Commission only made a *rule* as set forth in this petition.

The total taxable sales as found by the Tax Commission by means of the audit and as found by the Master Commissioner and confirmed by the Court of Appeals made by A. & P. in 1935 after allowing for all exempt sales was $44,442,342.12; that the deficiency in cancellation of prepaid tax receipts therefore amounted to $235,151.82, which based upon 3 cents on each full dollar or 3 per cent plus a penalty of 15 per cent amounted to $270,424.59. Referring to Kroger for the period from January 27, 1935, to September 7, 1935, the total taxable sales made after allowing for all exemptions was $29,291,982.07; that the deficiency in cancellation of prepaid tax receipts, therefore amounted on the same basis to $145,140.96, which with 15 per cent penalty amounted to $164,612.17.

The statute Section 9-a allowed interest thereon at 12 per cent per annum until paid.

The taxes levied, collected and unaccounted for were mingled with and thereby increased the gross receipts of the vendor, and therefore increased the rental to Judge Turner. (See pp. 949, 928, 977, R. Vol. 3.)

We have heretofore quoted from Judge Turner's opinion wherein he admitted that the record shows an accounting by these two vendors of only 2.47 per cent and 2.50 per cent of taxable sales. We now quote from the testimony of the defendant Evatt himself when he was called as a witness in this case:

> "I think during this period, the first year of the sales tax, these two vendors probably, like most vendors, did not collect all the taxes that the law said, or

possibly collected some tax for which stamps were not cancelled. I know that went on the first year, and I am afraid it still goes on now—I hope to a lesser degree." (p. 823, R. Vol. 2.)

Evatt said many vendors collected more than 3 per cent but have not accounted for more than 3 per cent of taxable sales. (p. 553, R. Vol. 2.)

It therefore appears that aside from the patent fraud perpetrated by these two vendors, we have the admission of Judge Turner and the bold declaration of the fraud by the defendant himself.

There is an additional reason why the decision of the Ohio Supreme Court operates as a denial of the equal protection of the laws.

The testimony taken before the Referee showed that there were approximately 300,000 vendors in Ohio and between 40,000 and 50,000 vendors who kept inadequate records. (pp. 447, 459, R. Vol. 1.) See p. 66 appendix.

The vendors of unit sales kept adequate records and were compelled to pay their legal taxes. Approximately 5,000 of those vendors who kept inadequate records were checked, and as a result assessments were levied and they actually paid into the State Treasury deficiency taxes amounting to more than $187,000 without petition for reassessment, all of which was later voluntarily refunded by Mr. Dargusch. The two vendors involved in this controversy, for reasons best known only to Mr. Dargusch, were never assessed, and if this decision of the Supreme Court of Ohio stands, they never will be compelled to account for taxes levied and collected which Mr. Evatt himself practically admits to be owing.

This decision and judgment results in nullifying the tax law. Judge Turner and the majority held, notwithstanding this act was a complete tax law so far as the power delegated to the legislature was concerned, that the power conferred upon the Tax Commissioner to adopt rules and

regulations to carry out the power conferred and duty enjoined to enforce the provisions of the act (Section 5546-5) and the power conferred and duty enjoined under Section 5546-9a did not empower the Tax Commission to make an assessment for personal liability based upon any information in his possession such as sworn reports of vendors and audits of their sales and business, unless the state could prove each specific individual sale. Judge Turner and the majority said this would require the exercise of law making power and writing something into the law.

Further, in order to justify the opinion and the judgment rendered by the Supreme Court, Judge Turner, the court, Evatt and Linton, Special Counsel, took the position that the levy of an *assessment* for personal liability under Section 5546-9a required the levy of a *tax* and the fixing of a rate therefor and that consequently, that required the exercise by the Tax Commissioner of law making power. Your petitioner contended that the assessment for personal liability under Section 5546-9a G. C. was merely an administrative act, under power delegated by the Legislature to enable the Tax Commissioner to fill up the details and make the law effective and operative so as to enable him to discharge his duty and enforce the law as provided in Sections 5546-5 and 9a.

By this decision of the Ohio Supreme Court, the chain stores and department stores, having violated the Sales Tax laws in failing to keep records of sales, are shown special favors. It would logically follow from this decision that since the State of Ohio would be unable to prove specific sales made without the collection of the exact tax, or having collected the tax thereon failed to cancel the proper amount of prepaid tax receipts, the large vendors would not be amenable to any process, if they refused to account for any taxes levied, although they may have collected every penny thereof. This discrimination against the honest vendors who kept records and who made an

honest accounting, and in favor of other and large vendors who openly and defiantly flouted the law, is a clear discrimination and denial of the equal protection of the laws. This result was only reached by an incompetent Ohio Supreme Court placing a strained and untenable interpretation upon certain provisions of the act.

It should be finally noted that the Tax Commissioner assisted by the present Attorney General of Ohio who was then in his department prepared and had introduced in the legislature while this case was pending in the Court of Appeals, a bill which would have authorized and permitted the destruction of all state records 5 years old including those on which the finding and judgment of the Court of Appeals was based. The bill as thus introduced failed to pass due to the vigilance of the Relator and his chief counsel. (pp. 556-560, R. Vol. 2.)

Petitioner files this petition on the .... day of March, 1945, by leave and order of this Court, and files herewith transcript of the docket and journal entries and orders of the Supreme Court of Ohio herein, the record of the Supreme Court pertinent to the questions and issues herein, together with 40 printed copies thereof, the record and transcript of the proceedings in the Court of Appeals which includes the pleadings, order, transcript of docket and journal entries, the Report of Referee and Master Commissioner, and the testimony before the Master Commissioner in printed form as filed in the Supreme Court of Ohio. Ten copies of such record are submitted to the Clerk of this Court.

B.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under Section 237 Judicial Code U. S., as amended; Section 344 Title 38 U. S. C. A.; F. C. A., and Paragraph (b) thereof.

In addition to the cases hereinafter cited under the heading "Questions" establishing our contention of incompetency of the court arising out of the existence of a pecuniary interest of the Judge writing the opinion and whose concurrence in the judgment rendered was necessary in rendering the judgment, and that it is a substantial question and results in a denial of due process of law and of the equal protection of the laws, we cite in addition the following cases as sustaining the jurisdiction of this Court on the record, since the Federal right and the assertion arose on and out of the action and judgment of the Supreme Court of Ohio itself and that this Court must determine on the facts whether that right or question on the record was waived or could be waived since the Federal question was specifically asserted in the application for rehearing (paragraph 8) and was necessarily denied in the judgment of the court denying the rehearing and overruling the motion to vacate which is the final judgment of the court.

Tumey vs. Ohio, 273 U. S. 510, 522, 523;
Davis vs. Wechsler, 263 U. S. 22, 24;
Tidal Oil Company vs. Flannagan, 263 U. S. 444, 455;
Brickerhoof Faris Co. vs. Hill, 281 U. S. 673, 677, 678, 682;
Saunders vs. Shaw, 244 U. S. 317, 320;
Missouri ex rel. vs. Gehner, 281 U. S. 313, 320, 321;
McKay vs. Kalyton, 204 U. S. 458, 463;
Grannis vs. Ordean, 234 U. S. 385, 392;
Great N. R. Co. vs. Sunburst Oil Co., 287 U. S. 358, 366, 367;
Hall vs. Thayer, 105 Mass. 219, 221.

Chapman vs. Crane, 123 U. S. 540, 548:

"If a federal question is fairly presented by the record and its decision is actually necessary to the

determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right within the meaning of Section 709 of the revised statutes as if it had been specifically referred to and the right directly refused."

See *Honeyman vs. Hanan,* 300 U. S. 14, 21.

Rogers vs. Alabama, 192 U. S. 226, 230:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

The Supreme Court of the United States said it will take jurisdiction where the question was raised in a motion to vacate a judgment of the state court and a federal question was set up.

Here a motion was made by the Relator himself embracing a federal claim, the same as set up in the application for re-hearing. It was supported by affidavits for and against. (pp. 973-979, 909, 929, R. Vol. 3.)

Such a motion and affidavits were also filed by counsel (pp. 923-929, 945-950, R. Vol. 3) setting up the same Federal claim.

This later motion was originally overruled at the same time application for rehearing was denied (pp. 909, 910, R. Vol. 3) and later originally overruled again (p. 910, R. Vol. 3) because overruled originally without oral hearing as required by rule of court. (pp. 923, 910, R. Vol. 3.)

Therefore the federal question was set up and necessarily denied. If the court as constituted was incompetent, then a rehearing was necessary and the judgment had to be vacated because it violated the 14th Amendment to the United States Constitution, that was the controlling question.

The appellee State *ex rel.,* and *appellant Evatt* etc. therein *filed briefs* in which the constitutional *question was*

discussed and denied by the respondent Tax Commissioner; i.e. *the disqualification of Judge Turner.*

All of this was before the court when the petition for rehearing was considered and denied. The question was vigorously urged.

The motion to vacate was denied, without oral hearing as provided by rule of court. On the protest of appellee therein oral argument was allowed and the order denying the motion was set aside.

At the oral hearing the constitutional questions herein set forth were further argued. The motion was again overruled.

The opinion of Judge Turner (pp. 953-972, R. Vol. 3) was rendered and the court entered judgment on August 9th, 1944. (pp. 906, 908, R. Vol. 3.) The application for rehearing was filed the 23rd day of August, 1944. (p. 906, R. Vol. 3.) The motion to vacate judgment was originally filed the 10th day of August, 1944 and again on October 10th, 1944. The application for rehearing was denied November 22, 1944, and final judgment thereon rendered on November 22, 1944. (pp. 907, 909, R. Vol. 3.) Motion to vacate judgment was overruled (p. 910, R. Vol. 3) on November 22, 1944 and again on December 20th, 1944. (p. 910, R. Vol. 3.)

C.

THE QUESTIONS.

The questions involved in this proceeding arise on the record under the 14th Amendment to the United States Constitution. See *Tumey vs. Ohio*, 273 U. S. 510, 522, 523.

The petitioner contended (p. 920, R. Vol. 3) that the disqualification of Judge Turner arising out of a pecuniary interest as set forth in the motion and affidavit of Relator herein (pp. 923, 926, 947, 949, 973, 974, 977, R. Vol. 3) taken in conjunction with the record, transcript, decision

of the court and judgment rendered therein, resulted in denying State of Ohio *ex rel.* Hugh M. Foster:

1. Due process of law.
2. The equal protection of the laws.

(See paragraph 8, Application for rehearing.) (p. 920, R. Vol. 3.)

It was further contended in oral argument on motion to vacate the judgment, setting forth the same grounds,

3. That the decision and judgment of the Supreme Court resulted in stripping the State of Ohio of all remedy to protect itself from frauds upon its sales tax revenue by licensed vendors.

The application for rehearing in that matter and the motion to vacate the judgment was filed in term time, and at the same time as the application for rehearing, containing the same federal claim under the 14th Amendment and was supported by affidavits. Judge Turner filed counter affidavits.

It was not denied that Judge Turner leased to The Kroger Company upon a lease which provided that he was to receive and did receive 5 per cent of the gross receipts of the lessee. Judge Turner did not deny that he leased to the R. & S. Dime Stores on the same basis for 10 years beginning with the year 1936. The existence of this lease was disclosed, for the first time, after judgment by the relator. (pp. 924, 927, R. Vol. 3.) The judgment affected the current, every day administration of the act since 1935, and every year since 1935. It was asserted and not denied that the taxes collected by Kroger and other vendors were mingled with their gross receipts and no separate account kept. (p. 949, R. Vol. 3.)

His lease with Kroger existed in 1935 and extends to the present time. The lease to the R. & S. Dime Stores, Carl G. Rossel, Lessee, runs for 10 years beginning in 1936.

It is contended that this pecuniary interest resulted in a disqualification based upon public policy and rendered the court incompetent to act or to render a judgment and that the judgment was void; that such disqualification could not be waived, because based upon public policy and because Foster was only a taxpayer and not seeking to recover taxes for himself but seeking to recover public revenue for the State and endeavoring to prevent fraud on the revenue. Further, that no disclosure was made of the R. & S. Dime Stores lease.

That the Supreme Court decision resulted in denying the equal protection of the laws in two important particulars.

(1) It discriminated against vendors who kept records of sales as required by Section 5546-12 and in favor of vendors who refused to keep records.

(2) Section 5546-5 permits certain classes of vendors to prepay the sales tax without collection of same from consumers, and as to this class, the tax commissioner established a practice by the process of estimation and employment of percentages to arrive at the amount of the deposit or bond to secure the payment of a proper tax under Section 5546-2. The percentage fixed by the Commissioner ranged from 5 per cent to 7 per cent according to the line of business of the vendor.

This procedure was approved by the unanimous judgment of the Ohio Supreme Court in *Cleveland Concession vs. Evatt*, 143 O. S. 551 (p. 525, R. Vol. 2.)

The Supreme Court decision in the instant case permits all vendors by the simple process of refusing to keep records of sales to escape any personal liability for taxes levied and collected or collectible under Sections 2, 3 and Section 9-a of the act, for which they do not voluntarily choose to account.

At this point in our petition, we will cite without discussion a number of leading cases bearing upon the effect of the disqualification of Judge Turner. A leading case

on this subject is the case of *Tumey vs. Ohio,* 273 U. S. 510, 523. Chief Justice Taft in the opinion held that the disqualification of the mayor who first heard the case was disqualified by reason of having an interest in the judgment amounting to only $12. In support of his conclusions, Chief Justice Taft cited the following cases:

Dimes vs. Grand Junction Canal, 3 H. L. C. 759;
Gregory vs. Railroad, 4 O. S. 675, 678, 679;
Peace vs. Atwood, 13 Mass. 324;
Taylor vs. Commissioners, 105 Mass. 225;
Kentish Artillery vs. Gardiner, 15 R. I. 296;
Moses vs. Julian, 45 N. H. 52;
State vs. Crane, 36 N. J. L. 394;
Railroad Company vs. Howard, 20 Mich. 18;
Stockwell vs. Township, 22 Mich. 341;
Findley vs. Smith, 42 W. Va. 299;
Nettleton's Appeal, 28 Conn. 268;
Cooley's Constitutional Limitations, 8th Ed. Vol. 2, 874.

In addition to those citations, we cite the following additional authorities:

Queen vs. Justices of Hertfordshire, 6 Q. B. 753; 115 Rep. 284;
Slacum vs. Sims & Wise, 5 Cranch (U. S.) 363;
Rapid City First National Bank vs. McGuire, 12 S. D. 226; 80 N. W. 1074;
Capran vs. Van Noorden, 2 Cranch (U. S.) 125, 126;
Signourney vs. Sibley, 21 Pick. (Mass.) 101;
Kentish Artillery vs. Gardiner, 15 R. I. 296;
Lee vs. British American Company, 51 Tex. Civ. App. 272.
Richardson vs. Welcome, 6 Cush. (Mass.) 331-333.

We reserve discussion of those authorities until we come to the brief which will be attached to and made a part of this petition. We point out at this time the dis-

tinction which opposing counsel will try to draw between the Tumey case and the instant case. Tumey's counsel objected to the mayor on the ground of interest before the trial. In the instant case, chief counsel was not present and did not even know of Judge Turner's declaration of disqualification until after the cause had been argued and submitted. There is no record of any waiver by petitioner. The courts have held a record on such an important matter is doubly important. All that there is here is the memory of those who seek to justify Justice Turner sitting. This can be quite uncertain. Our contention is, as shown by authorities, that no one had a right to waive the disqualification because this is a case involving public policy, and the relator in this case is only one of several millions of taxpayers in Ohio. Further Judge Turner disclosed only his interest in the Kroger lease, not in the lease to R. & S. Dime Stores.

D.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Supreme Court of Ohio has rendered a decision and judgment reversing the Court of Appeals and that decision and judgment raises a question of the violation of the 14th amendment to the United States Constitution as herein set forth.

In the application for a re-hearing and motion to vacate filed in the Ohio Supreme Court the question of the violation of the 14th Federal amendment was set forth and the authorities relied upon were cited and discussed but the application for re-hearing was overruled without any opinion being rendered by that court.

By reason of the decision having been rendered by a bare numerical majority of the court and by reason of one of the judges who wrote the opinion and concurred in that decision, whose concurrence was necessary to the rendition

of the judgment, by reason of having a pecuniary interest in the final judgment, that decision and the denial of the application for re-hearing has resulted in the application of principles not in accord with applicable Federal decisions and probably in the application of principles which have not heretofore been determined by the United States Supreme Court.

There was no Federal question asserted in the trial and decision of this controversy and the Federal question did not arise until it had been decided upon its merits by an improperly constituted court.

(2) The judgment of the Ohio Supreme Court rendered by a bare majority of that court reversing the judgment of the Court of Appeals rendered by the unanimous judgment of that court was erroneous as we have set forth in the statement heretofore set forth in this petition and as we shall further argue in the brief filed in support of this petition.

In the event this petition for certiorari should be allowed, we shall assume unless otherwise advised by the court that the Supreme Court of the United States will not consider and decide the merits of the original controversy but that it will merely determine whether or not there has been a violation of the 14th Federal amendment and whether or not the members of the Ohio Supreme Court who participated in the reversal constituted a constitutional court and in the event the court should determine that issue in favor of this petitioner that the court would then remand the question to the Supreme Court of Ohio for reargument.

Tumey vs. State of Ohio, 273 U. S. 510 at pages 523, 535.

(3) By virtue of the Ohio Sales Tax Act all vendors of taxable merchandise in Ohio are required to collect from their customers the amount of the tax upon each item of

taxable merchandise and to pay the same into the State Treasury. The statute, Section 5546-12 requires all vendors to keep records of their sales. It was found in Ohio that numerous chain stores and department stores and other classes of vendors who sold merchandise in small amounts involving a large number of items were not keeping records of their sales, and that there was no means to determine whether they were paying into the State Treasury the exact amounts of the taxes which were being collected by them on each sale. Thereupon the Tax Commission of Ohio charged with the duty of administering and enforcing the act and also being empowered by Section 5546-5 to adopt and promulgate rules and regulations deemed by it to be necessary to enforce and administer the act, did through its Research Department determine for the purposes of a tentative assessment against such vendors the fair percentage which under the bracket tax of Section 5546-2 of the act, the taxable sales of different classes of vendors would yield in aggregate taxes from each of such classes. (pp. 583-585, R. Vol. 2.) It was determined for the purposes of such tentative assessment that the average probable taxes which should be collected by chain food stores would be approximately 3.301% of such taxable sales.

It not being possible to check each individual sale where no records were kept, the Tax Commission employed approximately 60 inspectors to ascertain the aggregate volume of all taxable sales. All vendors were further required by law to make reports at regular intervals of the total volume of their taxable sales and the amounts of money which they had collected from their customers. The reports filed by the Kroger Grocery and Baking Company and the Great Atlantic and Pacific Tea Company showed that they did not comply with law and were collecting and were accounting for taxes in the one case only on a basis of 2.50% and in the other, on a basis of 2.47% of taxable

sales. Thereupon an audit was made by the inspectors, which indicated the same deficiency. The Tax Commission had checked the books of account of approximately 5,000 other small vendors and had collected from them the sum of approximately $187,000.

When the two vendors involved in this controversy were notified of the results of the audit of their books, the attorney for the Kroger Company protested and thereupon a meeting was held in the office of said attorney in Cincinnati (pp. 436-456, R. Vol. 1), which meeting was attended by numerous employees of the Tax Commission and soon thereafter, one Carlton Dargusch, a member of the Tax Commission who was assigned by the Commission to administer the act and who initiated the abandonment of these taxes, resigned his commission in the Tax Department of the State to accept employment with the Kroger Company. (p. 784, R. Vol. 2.) Before resigning he entered an order reciting in substance that since some vendors kept adequate records and other vendors kept no records, preventing the Tax Commission from detecting each specific sale "it shall be deemed that no deficiency exists against the vendors" and entered another order upon the journal of the commission revoking the action of the commission in collecting approximately $187,000 from other violators.

Thereupon the relator in this case as a taxpayer filed an action in the Supreme Court of Ohio seeking to have that court find the amount due from these two vendors and by writ of mandamus compel them to pay the amount found due into the State Treasury, 136 O. S. 295. That suit was dismissed on the ground that these vendors were not officials, trustees or agents of the State and therefore not amenable to the writ of mandamus, the court declaring the only remedy was to require an assessment. Thereupon this suit was filed in the Court of Appeals of Franklin County, Ohio, and the proceedings in that court and the

further proceedings in the appeal to the Ohio Supreme Court are more fully set forth in the earlier pages of this petition.

(4) By virtue of the Ohio sales tax, every citizen of Ohio from the lowest to the highest becomes a taxpayer by the purchase of taxable merchandise. The vendor is not the taxpayer under any of the sections of the law invoked in this proceeding which have not been changed since 1935 and he is made the tax collector. (Sections 2 and 3 of the act.) Every such consumer taxpayer has a right to expect that the money which they pay to vendors of taxable merchandise shall be paid into the State Treasury. It is believed that taxpayers as a rule are quite philosophical about the payment by them of their legimate taxes and as a general rule it is sought to make taxes payable by a uniform rate or at least have them fall equitably upon all classes of taxpayers. In any event it is inexcusable and highly reprehensible for large corporations dealing in taxable merchandise to collect the taxes and fail to account for them.

(5) In this litigation it is nowhere argued by the Attorney General of Ohio that these two vendors have accounted for monies that they have received from their customers. The Supreme Court of Ohio in the opinion of Judge Turner concedes that they have not done so because he states that the record shows that one of these vendors has accounted for only 2.47% of taxable sales and the other 2.50% of taxable sales. There is not a single item of taxable merchandise where the bracket tax under Section 5546-2 would be less than 2.50% of taxable sales, and every sale would have to be at 40¢. It follows therefore that there must necessarily be deficiencies due and owing from these two vendors.

It was not sought in this controversy to have the courts to find the amount due or by process of execution to collect the same. It was only sought to have the courts apply the

provisions of the statute and the proper rules of the commission adopted pursuant to legislative authority in levying an *assessment* against these vendors, so that these vendors could by application for reassessment have a further hearing before the Tax Commission in which Section 5546-2 and 5546-9a would impose upon such vendors the burden of showing the assessment was incorrect and prove the correct amount due to the State of Ohio and after determination of such reassessment give to the vendors the right of appeal to the courts as provided by Section 5546-9a.

(6) The opinion written by Judge Turner and the syllabus concurred in by three other members of the court shows that the majority of the Supreme Court have utterly misconceived the character of this suit. It is the theory expressed by Judge Turner that the relator in this case seeks to inject into the sales tax law by implication certain matters which the Legislature has omitted; that the decision of the Court of Appeals results in the levy of a *tax* against these vendors without further action on the part of the Tax Commission and that tax is arrived at by a percentage method instead of by calculation under the bracket tax set forth in Section 5546-2.

In this Judge Turner and the majority of the court are clearly mistaken. There was abundant authority in the statutes for doing everything which the decision of the Court of Appeals has commanded. The Court of Appeals did not order the levy of a tax. They merely commanded the Tax Commission to levy an *assessment* for personal liability for the amount of taxes levied and collectible from consumers on retail sales made by them for which they did not account based on the information in the possession of the Tax Commission, and to start in motion the machinery which would afford these two vendors the right to prove that the assessment made against the vendors was erroneous and excessive and that they had paid into the

State Treasury all the monies collected by them from consumers. The present Tax Commissioner of Ohio who is resisting the collection of the deficiencies from these two vendors voluntarily testified before the referee. We quote the following from that record (p. 839, R. Vol. 2):

> "The Referee: And you do not challenge the efficiency and the accuracy of the audits that were made, do you?
>
> The Witness: I have no basis to challenge them—no basis upon which to challenge them.
>
> The Referee: Audits were made and if those audits were correct, if they were efficient and are accurate, those audits do show that they were not collecting as much as 3% of their taxable sales, do they not?
>
> The Witness: I think that is correct."

In at least one other place in the record of the testimony taken before the Referee, the defendant Evatt states that he does not question the efficiency and accuracy of the work of the auditors.

(7) We call attention to another portion of the testimony of Mr. Evatt when he appeared before the Referee. We quote from page 525, R. Vol. 2:

> "Q. But you don't know, have in mind anything in your mind, from your observation and experience, where they are collecting more than three per cent sales?
>
> A. Yes, where we authorize prepayments upon finding that it is impracticable, to use the wording of the statute, to cancel tax receipts, such as concessioners of the baseball parks and circuses, we are permitted to grant them authority to pay the tax and not cancel tax receipts. In those cases we grant authority by making a survey in which we estimate the approximate number of sales at different prices, as, for instance, a vendor selling ten cent programs at a ball park, if all of the sales were single sales it is a ten per cent tax; however, there are sales where an individual

would buy two, three or four programs; this being a bracket tax, the percentage therefore on those sales is lower. We endeavor to strike an estimate of what we think the return would be by cancellation of stamps and we will grant permission on the grounds that they will pay a certain percentage of their gross sales. That varies according to our inspection from three and a half up to sometimes I think six or seven per cent."

This testimony pertained to Section 5546-5 which in Paragraph 2 gave permission to certain classes of vendors to pay the sales tax without collecting the same from their customers. That paragraph required the Tax Commission to conduct a hearing to determine "the conditions of the applicant's business" and whether it is impracticable to collect the tax in the manner otherwise provided in the sales act, and it further provides that the applicant shall furnish "bond payable to the State of Ohio in such amount as the Commission may deem to be sufficient to secure the prepayment of the taxes levied by this act in the manner desired * * *."

There is nothing in words in that section (5546-5) which states in what manner this determination shall be made, and there is certainly nothing in words in that statute which authorizes a Tax Commissioner to make any determination of liability by average percentage rates, any more than is contained in Section 5546-9a.

The Supreme Court of Ohio has definitely approved this procedure on the part of the Tax Commissioner in the case of *Cleveland Concession vs. Evatt*, 143 O. S. 551, in which case Judge Turner wrote the opinion. It is apparent therefore that both the Tax Commissioner and the majority of the Supreme Court of Ohio have been inconsistent. The Supreme Court of Ohio in the *Cleveland Concession* case has as we think approved the employment of the average percentage rates in determining a tentative liability for taxes collectible and has disapproved of it

when it was sought to have a tentative *assessment* made by the same method in the instant controversy.

(8) We think it is proper to state as one of the reasons for the allowance of the writ in this case that the action of the Tax Commissioner and the action of the Attorney General of Ohio and the decision of the majority of the Supreme Court of Ohio has become well known to the taxpayers of Ohio and especially to the legal profession in Ohio, and that the inconsistent action on the part of the state officials has been a shock to the citizens of Ohio, and that it tends to detract from the confidence of the people of Ohio in the courts.

We have alleged at length in this petition the importance of this appeal from the standpoint of legal procedure and legal ethics and the necessity of maintaining and upholding the respect of the people for the judicial branch of our government.

It is not less important to know the economic issues which stand out like a sore thumb in this controversy. Ohio has taken just pride in having built up a cash surplus in the Treasury of 92 million dollars which all authorities agree should be kept intact as a fund to be employed in post-war public improvements and to give employment to returning soldiers. If 92 million dollars is a commendable surplus to be preserved against the post-war period, truly it must be admitted that if that surplus were 150 millons, the situation would be that much more favorable. We confidently assert that if the sales tax law of Ohio had been rigidly administered, and if all chain stores and department stores had been compelled to turn into the State Treasury the money which they have actually collected from the consuming public that surplus would have been not less than 150 million dollars.

It is a matter of common knowledge and therefore public knowledge that the severe economic depression which began in 1929 extended through 1935 and 1939 and was

accompanied with wide-spread human suffering throughout the nation and more particularly in Ohio. The situation in Ohio was rendered particularly acute because in 1934 a constitutional limitation was placed upon collection of real estate taxes resulting in a loss of not less than 65 million dollars of revenue per year.

This loss of revenue created deficiencies which threatened to break down poor relief, pensions, the needs of schools and municipalities. It was sought to remedy this situation by the enactment of this Sales Tax Law. If this law had been honestly, faithfully and efficiently administered in the interests of the State instead of the large vendors, all needs would have been met but by the reason of faulty and discriminatory administration, not to use stronger language, the Federal government was called upon for large contributions and except for those contributions the needs of poor relief, pensions, schools and cities could not have been met.

It was therefore highly reprehensible on the part of Carlton Dargusch and his successor William S. Evatt and the Attorney General of Ohio, including his special counsel James N. Linton, former attorney for one of these vendors, to defend patent evasions of the law and to prevent the accounting by such large vendors for monies which had been paid to them by their customers, the consumers. Mr. Dargusch resigned to accept employment with Kroger. (p. 784, R. Vol. 2.)

Clarence O. Sherrill has acquired a national reputation as the efficient city manager of the City of Cincinnati. Mr. Sherill was a former official of the Kroger Company. As an outstanding public-spirited citizen, Col. Sherrill has become interested in the Sales Tax Law and has become an advocate of sweeping revisions of that law for the purpose of preventing patent frauds. We quote from a pamphlet which has been given wide publication by him:

> "On the basis of estimated collections by the bracket method now in use, the consumer is apparently paying as much as 3½ to 4% average tax on purchase price instead of the 3% required by the Sales Tax law and the fact that the retailers are not required to pay more than 3% on taxable sales, results in a loss to the State in revenue of probably $10,000,000 to $15,000,000 a year. In addition to this leakage of revenue to the State Treasury after it is paid by the consumer, there is also the heavy loss from use of prepaid sales tax receipts, over and over again."

There is more involved in this present case than the amount recoverable from these two vendors. This was conceded by Mr. Linton, the special counsel even for the year 1935, at page 6 of his brief in the Ohio Supreme Court. After stating the question involved as he conceived it he says:

> "The answer to the above question is of the greatest importance to this defendant and *many thousands of vendors for the year 1935.*"

Quite recently a member of the Ohio Senate requested the chief of the Sales Tax Division for an estimate of the amount of money the state was losing in revenues by reason of the acts herein alleged. The head of the Sales Tax Division gave an estimate, which was confirmed to your petitioner, that the state was losing at least five to eight million dollars a year, due to the claimed inability, to make the vendors keep records of sales and account for tax collections and to assess for a personal liability under Section 5546-9a—and the rules of the commission—where such vendors do not keep records of each specific sale.

Therefore, since a federal right was seasonably set up and denied, there exists grave, weighty reasons, growing out of considerations of public policy, public interest and the principles of natural justice, arising out of questions, which have been determined in a way not in accord with the applicable decisions of this Court, and why this Court

should take jurisdiction, and ultimately reverse the decision and judgment of the Supreme Court of Ohio herein.

Certainly, there is nothing in our constitutional structure, state or national, which admits of any branch of the government, administrative, legislative or even judicial, to openly and knowingly suffer such large vendors (tax collectors) to collect millions of dollars of taxes each year from the consuming public for essential public functions and purposes, and then permit them to appropriate it to their own use, upon the theory that no remedy exists—where such vendors refuse to keep a record of sales in compliance with the statute and the state cannot prove each specific sale, as a result of such failure.

The decision of the Court of Appeals in this case would effectively remedy that situation. The reversal of that decision by the Supreme Court has completely changed and destroyed that situation and nullified the law and the object and purpose of the law.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio commanding that court to certify and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 29779, State of Ohio *ex rel.* Hugh M. Foster vs. Evatt, Tax Commissioner; and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

STATE *Ex Rel.* HUGH M. FOSTER, *Petitioner,*

By MATTHEW L. BIGGER,
Attorney for Petitioner,
50 East Broad St.,
Columbus, Ohio.

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. . . . . .

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
a Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

BRIEF OF PETITIONER.

The opinion of the Court in this cause on the hearing on the merits is reported in 144 O. S. 64, Ohio Bar Association Report, August 14, 1944; 56 N. E. Rep. (2nd) September 20, 1944, p. 265. (pp. 953, 963, R. Vol. 3.) Opinion of the Court of Appeals in Case No. 3325, *State ex rel. Foster v. Evatt, Tax Commissioner,* is attached hereto.

No opinion was handed down on the denial of the application for rehearing. The action and order of the Court is found on p. 909, R. Vol. 3.

No opinion was rendered on the motion to vacate. The action and order of the court appears on Record, page 910, Vol. 3.

I.

THE PECUNIARY INTEREST OF JUDGE TURNER RENDERS THE COURT INCOMPETENT. ITS ACTION VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first question to be considered by this Court is that which relates to alleged disqualification of Judge Turner,

who wrote the opinion and whose concurrence was necessary to a judgment by a majority of the court as required by the constitution of Ohio, Article IV, Section 2.

The petitioner set up the claim that "disqualification arising out of a pecuniary interest as set forth in the motion and affidavit of relator filed herein, taken in conjunction with the record, transcript, decision of this Court and judgment rendered herein results in denying plaintiff-appellee due process of law and the equal protection of the laws violative of the 14th Amendment to the United States Constitution." (p. 920, R. Vol. 3.)

The motion of the plaintiff-appellee and the affidavit in which such facts are set forth are to be found (pp. 923-929, 945-950, 973-978, R. Vol. 3). Judge Turner's affidavit is found (pp. 920, 930, 941, 942, R. Vol. 3).

The facts with reference thereto are stated briefly in the petition herein. They are these:

Judge Turner was a lessor of the Kroger Grocery Company in 1935 and every year since. He was a lessor of the R. & S. Dime Stores in 1936 and every year since. The rent stipulated in each lease provides that the lessor shall be paid 5 per cent of the gross receipts derived from sales of the vendor.

Judge Turner disclosed the existence of the Kroger lease at the time the case was called for hearing on the merits March 21, 1944. The case was called ahead of its order on the docket. The case set for hearing at 9 o'clock a.m. was passed because of absence of counsel.

When this case was called, chief counsel Matthew L. Bigger had not yet arrived at the Court Room, the Court being so advised. This case was previously set as the second case and in ordinary course would be heard at 10 o'clock a.m. but was called at 9 a.m.

Judge Turner then disclosed his interest in the Kroger lease as stated. Thereafter said chief counsel arrived just after the Attorney General for appellant Evatt opened his

argument. He was not advised of the interest of Judge Turner as disclosed at that hearing until after the case was argued and submitted to the court and the parties had left the court building. This is undisputed.

There is no dispute about the facts as to the percentage base of the lease from Judge Turner to either of such lessees. There is no dispute of the fact that only the lease of the Kroger Company was disclosed at the opening of the hearing March 21, 1944.

The record shows that the tax collections were mingled with the receipts from sales of the vendors. It necessarily follows, that such lessors as Judge Turner, are benefited financially where such vendors do not keep records of each specific individual sale. *By reason of the amounts of taxes paid by consumers to the Kroger Company being mingled with the payments by those consumers to the Kroger Company for merchandise, Judge Turner is given a pecuniary interest. Such interest renders him and the court incompetent. That disqualifies him. The basis of that disqualification is public policy. Where public policy is the basis the disqualification is not personal to plaintiff and cannot be waived, and a judgment rendered by such a court is void.*

Whether void or voidable, it will always be set aside where attacked directly as it was here. If the offending court or Judge fails to act and persists in participating in such a judgment the appellate court has always set it aside. It denies due process of law. It denies the equal protection of the laws. It strikes at the very foundation of the administration of justice.

Here the offense was committed by a Judge of the Supreme Court and by the majority of the court. His action was necessary to constitute a majority.

Chief Justice Marshall of this Court in a very early case recognized the existence of this principle and the maxim underlying the principle "that no man can be a Judge in his own case."

Of the magistrate in *Slacum vs. Sims*, 5 Cranch (U. S.) 363 p. 367, Chief Justice Marshall said:

> "He is directly interested and his interest appears on the record * * * The discharge being granted by an incompetent court is wholly void."

The magistrate was liable on a bond with Sims, one of the parties. He discharged the party so liable and received a conveyance from Sims of his property.

If the judgment rendered by such a court is void, or if rendered by an incompetent court the action offends the 14th Amendment to the United States Constitution. *Tumey vs. Ohio*, 273 U. S. 510, 523.

The offense or error is committed by the Court itself. It should take cognizance of the limits of its own jurisdiction. If it does not the error will be available in the Court to which the party must appeal to seek relief. There is no other avenue of relief or protection for the petitioner herein, because the Supreme Court of Ohio is the court of last resort.

> "A plaintiff may assign error for want of jurisdiction in that court to which he has chosen to resort."
>
> P. 126. "Here it was the duty of the Court to see that they had jurisdiction for the consent of the parties could not give it."
>
> "It was therefore an error of the Court and the plaintiff had a right to take advantage of it."
>
> *Capron vs. Van Noorden*, 2 Cranch (U. S.) 125-126.

The reason that the court is incompetent and the judgment is contrary to public policy is expressed by the following decision:

Oakley vs. Aspinwall, 3 N. Y. 547:

> "In every grant of judicial power an exception is implied that a Judge shall not sit where he is interested * * *"

That court said p. 550 that "It is presumed he will act in his own interest."

This doctrine is approved by the Supreme Court of Ohio in Gregory vs. R. R., 4 O. S. 675. The court in that case in approving failure of counsel to cite cases bearing on this matter said the reason was,

> P. 679: "In but few cases do interested judges ever pretend to sit in such cases."

The rule in such cases is discussed in *Cooley on Const. Limitations*, 6th Ed., p. 509; 8th Ed. Vol. 2, p. 874.

> "To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.
>
> "Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in the appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

The following cases are cited:

Queen vs. Justices of Suffolk, 18 Q. B. 416;
Queen vs. Justices of London, 18 Q. B. 421;
Peninsular Co. vs. Howard, 20 Mich. 18.

On the question whether it can first be raised in appellate court we cite in addition to the above the following:

Richardson vs. Welcome, 6 Cush. 332;
Dimes vs. Proprietors of C. J., 3 H. L. Cas. 759;
Oakley vs. Aspinwall, 3 N. Y. 547;
Queen vs. Justices of Hertfortshire, 6 Q. B. 753.

Dimes vs. Proprietors etc., 3 H. L. C. 759. The Lord Chancellor had an interest as a shareholder in the plaintiff company.

Cause first heard by Vice Chancellor.

Heard on appeal before Lord Chancellor who affirmed.

Held Lord Chancellor was disqualified and his decree was reversed, but the decree of the Vice-Chancellor was affirmed since he had no interest and the appeal dismissed.

State vs. Crane, 36 N. J. L. 394—A proceeding to lay out a road. Assessments were to be made by a Board of Commissioners of Highways. One of the Commissioners was interested and participated in making the assessment. Held *this invalidated the assessment, even though there was a majority of the Commissioners who were competent to act without his vote. This was in obedience to the legal maxim that no judge can sit in his own case.*

Taylor vs. County Commissioners, 105 Mass. 225:

> "As one of the County Commissioners was a brother-in-law of Bullard, over whose land the highway was located, and who was entitled to damages, the proceeding was *coram non judice* and utterly void, and no subsequent waiver, consent or release could render it valid."

The foregoing is the opinion in full on issuance of certiorari.

Peninsular Ry. vs. Howard, 20 Mich. 18. A suit to assess damages in condemnation suit. One of the jurors was a stockholder in the Railway Company. *Held verdict void.*

Stockwell vs. Township Board, 22 Mich. 341:

> "A proceeding before the township board to remove an officer of a school district, is in the nature of a ju-

dicial investigation; and when one of the board is interested in the subject of the complaint, and *the presence of such member is essential to the quorum,* the proceedings are void."

Kentish Artillery vs. Gardiner, 15 R. I. 296. An action in trover for conversion of a uniform belonging to plaintiff. Defendant pleaded in abatement to the jurisdiction on the ground that the justice was a member of plaintiff company.

Held, that he was disqualified by his interest in the subject matter of the suit, and could not take jurisdiction of the case.

Lee vs. British American Company, 51 Tex. Civ. App., Syll. No. 5:

"An allegation that the judge trying the case was disqualified by interest in the property involved, and by having been an attorney in the litigation affecting it, is sufficient to show the judgment to be *void,* and not merely *voidable*; and a demurrer thereto was properly sustained."

The following is quoted from the opinion:

"And *although it does not appear from the record that any objection was urged to his disqualification at the time the judgments were entered, it is held to be a question that affects the jurisdiction and power of the court to act, and one which cannot be waived. City of Dallas vs. Peacock,* 89 Tex. 60-63."

That the interest of a judge financially, however remote, renders a judgment—rendered by or through him, void, see the following:

"Syllabus, p. 101: Where a probate judge had a valid claim against an estate, but had determined in his own mind, not to enforce his claim, and exercised jurisdiction over the estate, and granted letters of administration, it was held nevertheless that he was interested as a creditor, and that *the grant of administration was therefore void for want of jurisdiction.*"

P. 106. "The fact there was no exception taken" cannot aid the case.

"It is a general rule that want of jurisdiction, especially of a court of limited and special jurisdiction, cannot be aided by any waiver of exceptions or even by consent."

Signourney vs. Sibley, 21 Pick. (Mass.) 101-106.

"An objection on the grounds of interest of a judge affects the administration of justice; the motion to dismiss is in the nature of an exception to the magistrates jurisdiction and *may be taken at any time.*"

Richardson vs. Welcome, 6 Cush. (Mass.) 331-333.

P. 221. "The provision of Art. 29-7 of our declaration of rights, that 'it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,' rests upon a principle so obviously just and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates a judge in any matter in which he has any pecuniary interest or in which a near relative or connection is one of the parties. *It applies to civil as well as criminal causes*; not only to judges of the Courts of Common Law and Equity and Probate, but to special tribunals, and to persons authorized to decide between parties in respect to their rights. It existed under the common law from the earliest times."

P. 224. "The defect is incurable. It does not depend on the motives with which the judge acted * * *, but it is said by Chief Justice Shaw in *Gay v. Minot,* 3 Cush., 352, 354, that the case being *coram non judice,* the first probate was not voidable merely, *but void,* incapable of being made good by confirmation, waiver or ratification on the part of those interested."

Hall vs. Thayer, 105 Mass. 219, 221, 224.

The objection to the disqualification can be taken advantage of in the appellate court for the first time. Here it was raised on the record of the offending court.

P. 25. "The maxim that no man shall be judge, in his own case is one deeply rooted in the common law, and can never be overlooked anywhere, where impartial justice is one of the objects of judicial administration. * * *"

"It is not a matter of discretion with the judge, or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all, when he is thus interested or when he may be possibly subjected to temptation. His powers are absolutely subject to this limitation." (*Wash. Ins. Co.*, 6 Price, 2 Hopkins Ch. 2).

"And in a Court composed of several justices of the peace, if one of them is interested in a proceeding before them in which he acts at all, the judgment or determination will be void, though there is a majority in favor of the decision, without counting the interested justice. See *Queen vs. Justices of Hertfordshire*, 6 Q. B. 753, also 18 Q. B. 416, 421. It has been held that the objection is not waived by the neglect of the party to take advantage of it on the first opportunity. *But it may be raised in the appellate court for the first time.* 6 *Cush.* (Mass.) 352; 3 *House Lords Cases*, 787, 21 Pick. (Mass.) 106."

Peninsular Co. vs. Howard, 20 Mich. 18, 25, 26.

"We cannot enter into an analysis of the motives which may have produced (the judgment or order) the decision; it is enough to say that a single interested person formed a part of the court. * * * We must take care that interested parties do not join in deciding cases."

Queen vs. Justices of Hertfordshire, 6 Q. B. 753, 115 Reprint, 284. Lord Denman, C. J.

"The rule (of disqualification of an interested judge) must be made absolute. * * * The presence of the interested judge vitiated the proceedings."

Queen vs. Justices of Suffolk, 18 Q. B. 416, 158 Reprint 156.

P. 640. "By common law a judge must not be a party or otherwise interested. This rule seems to be established out of reasons of public policy and where a judge is interested as a party or otherwise * * * the disqualification cannot be waived by consent of either or both parties, because when the disqualification exists by reason of interest or relationship of the judge, the consent to waive does not remove the disqualification, but the disqualification exists notwithstanding the consent and waiver. It is against the policy of the law to permit a judge who is interested or within the forbidden degree of relationship to sit in the trial of the cause although the parties may consent thereto."

State v. Ham. 24 S. D. 639, pp. 640-641.

II.

THE MERITS OF THE CONTROVERSY.

We cannot know at this juncture whether in the event this Court should allow this petition for writ of certiorari whether the court would merely determine the question of the interest of Judge Turner and therefore the question of the disqualification of Judge Turner to participate in the final consideration and judgment of this cause and in the event of a determination that his interest disqualified him and render the judgment void or voidable, whether the court would in such event give consideration to the merits of the controversy itself, or whether it would in such event remand the case to the Supreme Court of Ohio for reargument. Because we cannot know what action the court will take, or what action it will desire to take, we briefly discuss the merits of the case itself.

The Supreme Court of Ohio by the necessary concurrence of Judge Turner expressed the opinion that the mandate of the Court of Appeals of Franklin County, Ohio, necessarily involved judicial legislation in that there was no provision in the laws of Ohio which permitted the making of any rule or regulation based upon fact finding or which expressly permitted the calculation of the sales tax by an average percentage rate, or which permitted a finding by the Tax Commissioner of the amount of taxes collected unaccounted for "based on any information in the possession of the Tax Commissioner."

In this it is clear that the Supreme Court of Ohio misconceived the character of the mandate of the Court of Appeals. There is nothing in that mandate which calls for any implication or which requires the court to find that the Legislature had omitted something which was necessary to be supplied in order to carry out the mandate of the Court of Appeals. It was not the mandate of the Court of Appeals that the Tax Commissioner be commanded to levy a tax upon these two vendors or fix a rate of tax, but on the contrary to levy an assessment for personal liability against a tax collector, which would be tentative in its nature and which would afford to the vendors the opportunity to petition for a reassessment and for a further inquiry as to the amount of the personal liability due and payable and in the event of an adverse decision against them upon such reassessment, the vendors could have the further opportunity under the affirmative provisions of the statute to appeal to the Court of Common Pleas of Franklin County, Ohio. The error of the opinion of Judge Turner and therefore the error of the Supreme Court's decision lies in the fact that it was assumed that it was commanded to immediately levy a tax and fix the rate and thereafter take summary action as upon such assessment of a tax, while as a matter of fact it was purely tentative having no element of finality even as to the

amount of personal liability and affording every opportunity to the vendors to make further question in the office of the Tax Commission and later in a court of justice. It also afforded the state an opportunity to produce additional evidence after the vendor filed his petition or appeal. The Sales Tax Act, Section 5546-5 gave to the Commission the power to make rules, which would be rules of administration, for the purpose of the proper enforcement of the provisions of the act against vendors and to prevent evasion of the tax as specifically provided in Section 5546-2 and 5 G. C. *The statute further provided, Section 5546-2, that a presumption arises that all sales are taxable until the contrary is established.*

This presumption was lawful and plainly made in order to place upon the vendor the burden of proving an honest accounting where the correctness of his accounting is questioned. It was based upon the principle recognized by all authorities that where the facts reside in the other party, and what is more, where he has under his control the power and remedy for collecting the exact tax and keeping a record thereof, the burden is on him and not on the other party. The recognized purpose of such a statutory presumption is to establish liability against the one in possession of the facts. It afforded him an opportunity for defense after assessment under Section 5546-9a G. C.

Another section of the Sales Tax Act, Section 5546-9a provided that the *Tax Commission be empowered to levy such tentative assessment upon any information, which might come into its possession.* These three sections of the Sales Tax Act are not quoted in this connection because they are fully set out in the summary statement which is found in the first branch of the petition.

Inasmuch as the Supreme Court of Ohio misconceived the character of the mandate of the Court of Appeals and has misconceived the character of the Ohio Sales Tax Act we are of the opinion that it is only necessary to show to

this Court on this appeal the authorities which have sustained the principle.

The Tax Law as enacted, was complete. The policy and standard of action were fixed in the law. See *Mut. Film Co. vs. Ind. Com.*, 236 U. S. 230, 245, 246.

The power to administer and enforce the law was delegated to the Tax Commissioner. That power was as complete as necessary to make the law operative and effective. Everything that was essential to make the tax law operative was enacted by the Legislature.

What was done by the Tax Commission here, when it formulated the rule, was simply the performance of administrative duties, delegated to the Tax Commissioner by law for "the proper administration and enforcement of the provision of the act," Section 5546-2-5-9a. It was a "*filling up of the details*" and in no sense legislation. Both the Supreme Court of Ohio and of the United States have recognized this principle and power as essential to make a law effective in its application and operation.

On this latter point we call the Court's attention particularly to the case of *Wayman vs. Southard*, 10 Wheat. (U. S.) Chief Justice Marshall 1, 43, and *Coady vs. Leonard*, 132 O. S. 329; *Field vs. Clark*, 143 U. S. 649, 693, 694.

The *C. W. & Z. R. R. Co. vs. Com.*, 1 O. S. 77, 88, 94, the court declared in substance that a tax law is complete as was this tax law, i.e. when the levy of the tax was made, and it was specified upon what the levy was made, the rate, who should pay it, when it was to be paid, where it was to be paid and stated the object and purpose of the tax and that the delegation of power to enforce it merely related to its execution. *This necessarily means* as applied to the instant case that power to enforce its collection includes the power to fix a personal liability on a vendor who has full control and power in collecting the tax for the state, as provided in Section 5546-9a G. C.

The court in that case said page 94:

> "The power to command a thing to be done, includes the power to authorize it to be done."

Therefore since the legislature delegated to the Tax Commission the authority and power "to administer and enforce the provisions" and find the amount of personal liability under Section 5546-9a and declared the presumption in Section 5546-2a it required no legislation or implication as contended by the Tax Commissioner, and the Attorney General.

The Court and the Tax Commissioner and his special counsel contend the power to assess evaporated in the process of transfer from the legislature to the Tax Commissioner. 234 U. S. 493, 494, *U. S. vs. Atchison Ry. Co.*

In the case of *Wayman vs. Southard,* 10 Wheat. (U. S.) 1, 43, Chief Justice Marshall said:

> "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

In view of the foregoing, one is compelled to wonder upon what or why the Supreme Court of Ohio reasoned and decided as it did. The opinion of Judge Turner and the judgment of the court resulting as it does in the enforced collections of sales taxes from the public and from every man, woman and child, for public purposes and at the same time exonerating and freeing such tax collectors from any accounting to the state for such taxes and releasing them from any liability therefor, where they brazenly refuse to keep records of their sales, and are upheld by a Tax Commissioner who says that to require vendors to obey the statute and keep such records, would be arbitrary and *unreasonable exercise* of his authority, is so ob-

viously untenable and contrary to the plain provisions of the act and contrary to all authorities that it is a shock to every sense of justice. (pp. 528, 828-831, 545, R. Vol. 3.)

It is clear, however, that in so acting the Court had to violate the most fundamental principle underlying English and American jurisprudence, to-wit:

One cannot be a judge in his own case. If he does so, his action or his participation in action by the court, renders the court incompetent, and violates the 14th amendment.

We cite the following authorities:

Sutherland Statutory Construction, 3rd Ed. Vol. 3, Section 6706;
San Antonio vs. Mehaffey, 96 U. S. 312;
Unity vs. Burrage, 103 U. S. 458;
Debolt vs. Oh. L. Ins. Co., 1 O. S. 564, 566, 567;
Murray's Lessees et al. vs. Hoboken L. Co., 18 How. (U. S.) 272, 275, 277, 278, 280, 282;
Phillipps vs. Conn., 283 U. S. 595, 596, 599;
Helvering vs. Rankin, 295 U. S. 123, 131;
U. S. vs. Atchison Ry. Co., 234 U. S. 491, 493, 494;
Pacific States Box Company vs. White, 296 U. S. 176, 185, 186;
Mut. Film Co. vs. Industrial Com., 236 U. S. 230, 245, 246;
Hampton Jr. vs. U. S., 276 U. S. 404, 408, 409, 412;
N. Y. Cent. Ry. vs. U. S., 287 U. S. 12, 20, 26;
Schechter vs. U. S., 295 U. S. 495, 529, 542;
Cooley on Const. Limitations, 8th Ed. pp. 138, 139, Vol. 1;
Gilbert vs. Craddock, 67 Kans. 346, 72 Pac. 869, 871;
Thompson vs. Consold. Gas Co., 300 U. S. 55, 69-70;
Dooley vs. Penn., 250 Fed. 142, 143;
Sawyer vs. U. S., 10 Fed. (2nd) 416, 420.

In the case of *Panama Refining Company vs. Ryan*, 293 U. S. 388, the court made the following statement at page 421 of the opinion:

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

At page 426 of the opinion the court cited the case of *C. W. etc. Railway vs. Clinton County Commissioners*, 1 O. S. 88.

The Court of Appeals in the instant case and former Chief Justice Marshall as Referee were merely applying the principles above declared.

On the controlling effect of the presumption established in Sec. 5046-2 G. C. which was practically ignored by the court, we cite the following:

Jones vs. Brim, 165 U. S. 180, 184, 185;
Jones Evidence—Civil Cases, Section 11a, 196;
Atlantic C. L. Ry. vs. Ford, 287 U. S. 502, 507, 508;
Bandini vs. Superior, 284 U. S. 19;
Ferry vs. Ramsey, 277 U. S. 88, 94, 95;
Ry. vs. Turnispeed, 219 U. S. 35, 42, 43;
People vs. Osaki, 286 Pac. 1025, 1031;
Wigmore Ev., 4th Vol., Sections 290, 294, 2486;

Harper vs. Highway (Tex.), 89 S. W. (2nd) 448, 449.

It would seem that the present is no time, when the general public are ungrudgingly bearing heavy taxes in state and nation, to meet the exigencies of a critical period in our history, to suffer a gigantic fraud upon the public revenue where the undisputed facts show plainly that such fraud exists and tax collectors are permitted to retain that revenue to the great injury of the state and its citizens.

That may be the evolution of law and justice in this land, but we question it. We prefer to agree with the Court of Appeals in its opinion (p. 71 App.) where it said:

> "The collection of taxes has assumed the greatest importance at this time, and the taxpayer will not be satisfied if he pays in full while others escape a substantial part of the burden."

Respectfully submitted,

MATTHEW L. BIGGER,
Attorney for Petitioner,
50 E. Broad St.,
Columbus, Ohio.

APPENDIX.

Decision—Court of Appeals of Franklin County, Ohio.

Rendered on the second day of August, 1943.

Case No. 3325.

By the Court:

This matter is before the court on an application for a permanent writ of mandamus against the defendants, and comes before us upon the several pleadings, the report of the referee and the arguments of counsel. The second amended petition was filed May 17, 1941. The original petition was filed on the twentieth of January, 1941.

The relator recites the fact that he is and always has been a taxpayer and a resident of the City of Columbus; that William S. Evatt is the qualified and acting tax commissioner of the state of Ohio.

It is averred that the Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company are corporations doing business in the state of Ohio and as such were vendors within the meaning of Section 5546-1, effective January 1, 1935; that under Section 5546-2 it was provided that for the purpose of raising revenue, an excise tax was levied on every retail sale made in the state of Ohio of tangible personal property on and after the first day of January, 1935, and ending on the thirty-first day of December, 1935, with certain enumerated exemptions; that under Section 5546-2 it is further provided that for the purpose of proper administration of the act and to prevent evasion of the tax, it shall be presumed that all sales made in the state are subject to the tax until the contrary is established.

It is alleged that under Section 5546-9a, it is provided that in case any vendor failed to collect the tax imposed under said act, or having collected the tax, failed to cancel the prepaid tax receipts he shall be personally liable for such amount as he failed to collect or for the amount of

the tax receipts which he failed to cancel, and that in such cases the commission has power to make an assessment against such vendor based upon information in its possession or which should come into its possession.

It is further averred that for the sole purpose of securing information upon which to base an assessment the auditing department of the sales tax section, under direction of R. C. Grove, chief auditor, and at the expense of thousands of dollars, the state made a complete audit for the year 1935 of the books and the retail sales made by more than 2,000 retail stores operated in Ohio by the Kroger Grocery & Baking Company and the Atlantic & Pacific Tea Company; that said audit was complete and a finding based thereon was delivered to the tax commission; that the records are in the possession of the commission; that the grocery company was personally liable under the provisions of the sales act for the period of January 27 to September 7, 1935, in the amount of $164,612.17, and that the Atlantic & Pacific Tea Company was personally liable for the period of January 27 to December 28, 1935, in the amount of $276,-101.28; that the required information in reference to both companies is in the possession of and available to the defendant during the year 1935 and since; that although the tax commissioner under the act is given the power to assess the amount of personal liability against said vendors, he has arbitrarily failed and is now arbitrarily refusing to perform the duty prescribed and to exercise the power residing in him to make the assessment for such personal liability so established, and that his act therein constitutes a gross abuse of discretion; that by reason of the failure of the defendant to exercise the power given him, the revenues of the state have been lessened to the amount of the uncollected taxes due from said vendors, and that this relator and others similarly situated have been prejudicially and irreparably damaged and have no other adequate remedy at law.

The prayer of the petition is that a writ of mandamus issue against the defendant requiring him to make an assessment against the Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company as vendors under the sales tax act, effective January 1, 1935 (General Code, 5546-1 to 5546-23, incl.), based upon the information now in the possession of said defendant as provided in Section 5546-9a, General Code, effective January 1, 1935; that costs may be assessed including an allowance for counsel fees as herein set forth and for such other relief in the premises as may be just and proper.

While the prayer is that the writ issue against the defendant and there are other defendants named, it would appear that the prayer is that the writ issue against William S. Evatt, tax commissioner of Ohio.

Answer.

The defendant Evatt by way of answer admits formal matters, but specifically denies that he ever had in his possession or control, or that he has any knowledge of the existence of any information tending to show that the two companies collected moneys purporting to be in payment of sales tax from customers during 1935, for which either failed to cancel prepaid sales tax stamps or pay such moneys into the state treasury, or that either of them made taxable sales for which they collected revenues not paid into the treasury.

Defendant specifically denies that the auditing department under the direction of Grove made an audit for the year 1935 supporting the finding that the grocery company was indebted in the amount of $164,612.17, or any other amount, or that the tea company was indebted in the sum of $276,101.28, or any other amount; that he has no knowledge of the existence of any information of the nature alleged in the petition.

It is alleged that the tax commission delivered to the department of taxation at the time of its creation certain records which reflect that such commission made a determination and finding that no moneys were due from either company for the year 1935; that the tax commissioner has no right to review the determination of the former tax commission, which were not then pending, but which had been completed and that no appeal was prosecuted.

It is alleged that the defendant has no knowledge of facts that would justify a determination that the moneys are due from said corporations for taxes during the year 1935, and that even if the court should determine that he has the power to make an assessment upon the existence of facts sufficient to justify, he could not in good faith make such an assessment. Other allegations are denied.

As a second defense it is alleged that in an action brought in the Supreme Court bearing No. 27500, wherein the plaintiff and defendants in this case were the same and the issues were litigated, that the Supreme Court decided the issue in favor of the defendant and rendered final judgment and dismissed such proceedings, and that by reason thereof the plaintiff was estopped.

Reply.

To this answer a reply is filed, denying the allegations of the first defense except those which admit the truth of the matters set forth in the plaintiff's second amended petition. The allegations of the second defense are denied.

On February 18, 1942, the cause came on for hearing on the second defense and this Court then found against the defendant upon the question of *res judicata*, and that the judgment of the Supreme Court in *State, ex rel. Foster v. Miller* was not a bar to this present suit. No appeal was prosecuted from that judgment, and it is no longer an issue in this controversy.

It was ordered that the cause then proceed to trial upon the second amended petition and the first defense only.

Thereafter, on March 25, 1942, the plaintiff made an application for the appointment of a special master commissioner, to which the cause shall be referred, and the court ordered that the cause be referred to Carrington T. Marshall, who was appointed special master commissioner with the powers of a referee in chancery, to take the testimony and report to the court his conclusions of law and fact involved in the cause.

Thereupon the matter was heard by the referee who made a report to this Court on December 8, 1942, and a motion was made by the plaintiff that the court confirm said report of the referee, both as to findings of fact and conclusions of law, and that judgment be entered in favor of the relator in conformity with the report of the referee. The respondent moves that the report be overruled.

Report of the Referee.

The report of the referee recites conclusions of fact and of law after cause had been heard by him on the evidence. The issues are stated by the referee as the same are here stated. The referee gives a synopsis of the testimony of some of the witnesses, which may be now alluded to. It is stated that the defendant, Evatt, during the course of his testimony, made it clear that he did not know that audits had been made, and that he never examined them, and did not know their contents, and that he had made no detailed study of the reports filed by the corporations. It is stated that the real defense asserted by the defendant is in the status of sales tax law as originally enacted, and the determination made by one of the members of the commission in 1936, in which it is claimed that there was a finding that no moneys were due from said corporations for tax deficiencies for the year 1935. The defendant as a witness

claims that there is no machinery provided in the law, as it existed in 1935, for making any finding of tax deficiencies against any vendor unless the commission could prove that specific taxable sales were made upon which no tax was collected. The defendant, Evatt, claimed that if the vendors did not keep accurate book of accounts showing individual taxable sales, that no tax deficiency could be assessed, and that the commission was powerless and that no matter how false the returns might be, the taxing authorities were without remedy.

It is reported by the referee that the defendant and other witnesses connected with the commission have testified that the levying of a tax on specific sales is not only impractical, but impossible, against vendors who did not keep records; that until the amendment of Section 5546-12a, the commission was without power to apply a weighted rate, and that there is no authority to levy a deficiency tax against any vendor unless the commission is able to prove a specific sale upon which no tax has been paid.

The referee examines at length the evidence produced on behalf of the taxing authorities and criticizes the position taken by them. He also comments upon the opinion of the attorney general, In re Assessment of Delinquent Sales Tax, Opinion Atty. General, Vol. II, 1936, p. 1134, and asserts it to be a fact that the opinion does not deny the right to the commission to value the property for purposes of taxation where no specific record has been kept of the individual sales. It is asserted that the referee is unable to find anything in the opinion of the attorney general which condemns the weighted average percentage rate, but that such average rate may be used as information.

The referee proceeds at length to analyze the testimony of the various witnesses appearing before him. It would be gratifying if we had space enough to give a detailed examination in this portion of the referee's report. He summarizes the matter in twenty-eight findings of fact and

four conclusions of law. We will attempt to condense his findings of fact within a limited space, and in doing that will recite his findings in narrative form without a numerical designation, except we will follow the order in which he has set them down.

The two companies whose tax is in question were vendors within the meaning of the tax law, and neither kept a record of individual sales. They kept books showing purchases of taxable and non-taxable merchandise and the examiners were able to separate the amount of taxable from the non-taxable. An audit was made of the business of the Kroger Company, beginning January 27, 1935, and ending September 7, 1935, which audit became "information" that that vendor had sold taxable merchandise during that period in the sum of $29,291,972.00 and that prepaid stamps were cancelled during the same period in the sum of $735,000.00, plus, the same being approximately 2½ per cent. of the taxable sales. 3 per cent of such sales would be $878,000.00, plus, and after deducting the stamps cancelled, the balance is $143,000.00, plus, which, with 15 per cent penalty is increased to $164,000.00, plus.

The audit of The Atlantic & Pacific Tea Company in the same method discloses that the stamps cancelled were 2.47 per cent of the taxable sales of $1,335,000.00, plus, which with 15 per cent penalty added amounts to $270,000, plus. Pursuant to statutory authority the commission promulgated a code of rules, a part being instruction to examiners, among which were rules to the effect that in an audit of vendors who had not kept a record, the examiner may compute the amount for the period under investigation. As to those vendors whose business was large in volume and the sales small and where there was no record kept, the rule provided that all the vendors' invoices should be taken, and from that it be determined what is the average markup in the vendor's business. In selecting the items for this markup the examiner should examine

the vendor to determine which items constituted the largest percentage of his sales, which should then be applied to the total purchases and this should represent the gross income for the period. Examiners should be careful to compute the percent markup on the basis of the cost and not of the sale price.

Another option relates to unit sales, not pertinent. Detailed instructions for making audits were found in Schedules "B" and "C." Where an examiner has completed an audit and finds it necessary to make an assessment, three options are provided for arriving at the assessment against the vendor, which are enumerated.

Finding No. 18 is to the effect that the weighted rate for Kroger, and other like business, was arrived at by a study of the statistical division of the sales tax department in conjunction with the reports known as "spot check" made by checking at various times on various days and hours the actual sales made by the vendor and the tax applicable thereto.

A number of the examiners testified that the rate arrived at was fair and should be approximately 3.30 per cent of the taxable sales, including sales under 9 cents, upon which there is no tax.

The audit of the Kroger Company for the period from January 2, 1935, to September 7, 1935, was complete to the point where it became the duty of the examiner to execute an actual rate chart, and by the use of percentages, estimate the tax deficiency. The audit of the tea company for the period from January 27 to December 26, 1935, is equally complete with the grocery audit and equally subject to the rules stated.

A large force was engaged in making these sales for both companies. Vendors in the state of Ohio were classified into two classes according to their manner of doing business: (1) Vendors of unit sales; and (2) vendors who kept inadequate records. There were between 200,000 and

250,000 vendors of unit sales and between 40,000 and 50,000 vendors who kept inadequate records. The unit sale vendors could be easily audited and their taxes ascertained. Approximately 5,000 of the vendors who kept inadequate records were checked, and as the result there was assessed and paid into the treasury deficiency taxes amounting to approximately $187,000.00, all of which was later voluntarily refunded to them by the tax commission. The total sales tax collected for the year 1935 was approximately $50,000,000.00.

After the audit, the business of the grocery company was completed and recapitulated and before an actual rate chart had been executed, Mr. Dargusch, a member of the commission, sent employees to Cincinnati to consult the grocery company. Apparently quite a number of unnamed employees of the commission attended this meeting, of which no report was made. On June 5, 1935, a letter was addressed by Mr. Dargusch to the attorney general, requesting an opinion on a number of questions, which opinion is an exhibit dated July 24, 1936, to which reference has been made. (Opinion A. G. Vol. II, page 1134.) After June 5, 1936, no further audit was made of vendors who kept inadequate records, and no further assessments were made against that class of vendors for the business of the year 1935, that class being placed under a voluntary basis.

The foregoing is a synopsis of the finding of facts and is of course greatly curtailed and can only be fully understood by reading the complete report of the referee.

Conclusions of Law.

The conclusions of law are as follows:

(1) The present tax commissioner, the defendant, by virtue of Section 1464, General Code, is the successor of the former commissioner and by virtue of Sub-section 3 has power to review, re-determine or correct not only his own

previous orders, but also those of the former tax commission.

(2) The rules promulgated by the tax commission were within the authority conferred upon the commission by several sections of the General Code, and the rules are a reasonable exercise of that authority.

(3) The audits made by the examiners appointed by the commission were made pursuant to the rules promulgated.

(4) The audits of 1935 sales of the Kroger Grocery Company and the Great Atlantic and Pacific Tea Company in the possession of the defendant constitute "information" within the meaning of Section 5546-9a, which imposes upon the defendants the clear legal duty to execute an "actual rate chart" to serve upon said vendors notice of assessment, leaving to the vendors their legal remedies to petition for reassessment. The referee recommends that the court enter a judgment in favor of the plaintiff, ordering that a writ of mandamus be issued against the defendant, Evatt, to execute an actual rate chart, and to serve upon vendors, the two companies, notices of assessments and thereafter, to take such additional administrative steps as may be necessary to endeavor to collect final deficiency assessments pursuant to the audit heretofore made under the rules of the commission.

We have very interesting briefs in support of and in opposition to the motion to confirm the report of Judge Marshall, referee.

The sworn reports of the Kroger Company for the entire year 1935 show total sales in the sum of $51,948,804.11 with sales not taxable in the amount of $7,890,907.80, leaving $41,057,896.31 of sales subject to the tax upon which prepaid receipts have been cancelled in the sum of $1,057,819.03. The tax collectible at 3 per cent would amount to $1,321,736.88 leaving a deficiency based on 3 per

cent of $263,917.85 which by an addition of 15 per cent penalty is increased to $303,505.52. If a per cent of 3.3 plus penalty of 15 per cent. be used in computation, the deficiency will be increased to $455,505.27.

Another computation is made from an audit of the books and records of the Kroger Company for the period from January 27, 1935, to September 7, 1935, which shows the amount of taxable sales for that period to be $29,291,-982.07 upon which prepaid receipts are shown as cancelled in the sum $735,618.54 which shows a deficit at 3 per cent with the penalty of 15 per cent of $164,612.17 which on the same basis but at 3.3 per cent, plus penalty of 15 per cent, shows a deficit of $265,669.40.

As to the Atlantic and Pacific Tea Company, the sworn reports for the year 1935 shows total sales of $47,583,-945.29 of which $35,430,256.91 are taxable upon which cancelled prepaid receipts are shown in the sum of $1,024,-870.36, the tax collectible at 3 per cent, being $1,062,907.71, leaving a deficiency based upon 3 per cent of $38,037.35 which with 15 per cent penalty added is $43,742.95.

The total amount of taxable sales shown by an audit of the books and records of the Atlantic and Pacific Tea Company for the year 1935 is $44,442,342.12, upon which prepaid receipts are shown as cancelled in the sum of $1,098,118.44, which shows a deficit based upon 3 per cent with the penalty of 15 per cent added for the year amounting to $270,424.59 which on the same basis but at 3.3 per cent, with 15 per cent penalty, shows a deficit of $423,750.68.

Counsel for respondents have claimed in written and oral arguments that certain of the findings by the referee are not supported by the weight of or any evidence submitted to said referee. We have had filed with us the record of the evidence taken before the referee, designated bill of exceptions, the same being filed on January 7, 1943. It contains almost a thousand pages of typewritten record. We have examined the same, not in complete detail, but

with such detail as justifies our conclusion that the several findings, with the modifications noted and required by this opinion, are supported by sufficient evidence.

Counsel for defendants rely upon the Supreme Court decision in the case of *State, ex rel. Foster v. Miller*, 136 O. S., 295. It is there held that a retail vendor is not a tax collector or a trustee of the state, is not amenable to the process of mandamus and that such writ will not compel the observance of law generally, but will be confined to commanding the performance of specific acts especially enjoined by law to be performed. The third syllabus of the case is to the effect that in an action in mandamus a court will not substitute its discretion for that of an administrative officer in the exercise of his authority, and in the absence of the allegation and proof that an officer or commission charged with the duty of collecting sales taxes has refused arbitrarily to collect the amount due on the specific taxable sale or sales, the writ of mandamus will not lie.

This Court has already ruled after hearing upon evidence that this case in the Supreme Court is not *res adjudicata* of the issue here. As before stated, it is quite apparent that the first and second syllabi were correct determinations of the issues presented to the Supreme Court. As to the third syllabus there arises the question if it was responsive to any proposition of law presented to the court by the pleadings and the facts, but after having given the matter close scrutiny we are of the opinion that in using the term "specific taxable sale or sales," the court did not intend to say that it was necessary to prove "individual" sales. There is a distinction in the two terms which should be applied in the determination of this particular issue. The amount due on "specific taxable sales" could well be the remainder as shown after deducting the exempted sales from the gross sales, leaving the net amount of "specific taxable sales." The matter was before this Court at the

time of the oral argument and counsel were questioned as to how it would be possible to have any check on vendors who kept no records except by having an inspector standing at each cash register during all business hours, checking each individual sale of every business house throughout the state. There are more than 2,000 Kroger stores in the state and a large number, possibly more, of the Atlantic and Pacific Tea Company stores. The last paragraph of Section 5546-2 places upon the vendors the burden of showing the payment of a proper tax, and provides "for the purpose of the proper administration of this act," and to prevent the evasion of the tax hereby levied, "it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established." If the Supreme Court in the third syllabus of the Foster case meant to require the state to prove in detail each specific taxable sale or sales before the writ would lie, it is manifest that the purpose of the act would fail on account of impossibility of complying with the same. However, if we interpret the phrase found in the third syllabus of the Miller case "due on a specific taxable sale or sales" to mean the total of the individual sales made of all taxable articles, the way is open to ascertain this total and the amount due thereon by the simple process of determining from the report of the corporations their total sales and by a deduction of the amount of prepaid sales tax, arriving at the amount of the unpaid balance.

It is impossible to conceive that if the Legislature had the purpose of collecting the sales tax on the innumerable items of small amounts, that it would have required the state to prove the unpaid tax on each individual item, an impossible burden. We prefer to interpret the third syllabus of the Foster case so as to make the act effective rather than by a narrow interpretation preventing its operation.

A reading of the testimony of the witnesses connected with the tax division, including that of Mr. Evatt, shows that to determine the tax due on each individual sale was impractical and in cases where there were millions of sales the burden would have rendered the business unprofitable if a record of all individual sales were required to be kept. It is obviously impossible for the taxing authorities to check individual sales where it is conceded that no records of such sales were kept.

Without endeavoring to give either the record or to quote the provisions of the various sections, we cite as particularly applicable, Sections 5546-1, 2, 3, 5, 8, 9a, 12, 15, 17 and 1465-1, General Code, *et seq.* We believe we can safely say that the purpose of the Legislature was to secure necessary revenue from sales tax, but that there has been the real recognition of the fact that to collect a small tax from many individual sales, there must necessarily be some workable plan within the limits of the statutory rule by which the tax officials can equitably determine the amount of tax to be paid by the retail purchasers, or the amount of cancelled sales stamps that must be accounted for by the vendor.

We are not in harmony with the view of the state, that, inasmuch as this matter presents many difficulties, it is to be practically abandoned and the taxpayer left to his own devices, so that the burden of collecting may be lightened.

The collection of taxes has assumed the greatest importance at this time, and the taxpayer will not be satisfied if he pays in full, while others escape a substantial part of the burden.

In the case at bar the matter seems to have bogged down on the theory that the provisions of the statute cannot be successfully enforced.

Much has been said about the effect of the attorney general's opinion upon which the tax commission origi-

nally relied in its action to forego any further attempt to enforce the personal liability of the vendors for sales tax under General Code 5546-9a. This opinion was rendered in answer to two questions. It specifically answers the first question propounded to the effect that the commission may not employ the weighted average percentage rate for the particular trade or business of the vendors alone to determine the specific amount of tax due from said vendors. In concluding the answer to the first question, the attorney general said:

> "Although under the broad language of Section 5546-9A, * * * the tax commission is not limited to any particular kind of evidence in determining the delinquency or deficiency assessment, if any, to be made against the vendor, the assessment made by it must be based upon facts and information as to the particular vendor rather than upon a weighted average which may represent the percentage of no single vendor in computing such average."

The answer to the second question is, that the evidence secured by spot checks may be used by the tax commission as information under General Code 5546-9A, but may not be the sole basis of an assessment for delinquent sales tax but may be used with "any (other) information within its possession or that shall come into its possession," in determining the question.

In this case there are four sources of information respecting a determination of the amount of tax representative of the personal liability of the vendors. (1) The St-10 reports which contain detailed information of the sales of the vendors from the total of which, in all instances, are deducted the sale price of all items specifically exempted by Section 5546-9A, General Code, but including the amount of sales on items retailing at 9 cents or less. In some instances the amount of these sales also are deducted. (2) The reports of the auditors of the tax commission made up from the books and records

of the vendors exhibiting substantially the same information as found in the St-10 reports, deducting sales representative of exempted items other than sales of less than nine cents. It is interesting to note that, although the total business appearing to have been done by the vendors according to the auditors' reports and according to the St-10 reports is very large and made up of great numbers of items, the total amount of business done as appearing in both of these sets of reports approximate the same. (3) The spot checks made by the representatives of the tax commission and conducted in the most detailed manner and with specific reference to the various types of businesses subject to the sales tax, and with particular reference to the class of business in which vendors are engaged. (4) The mathematical probabilities demonstrated by the bracket tax rates set out in General Code 5546-2.

It is obvious that all of these numbered items were available to the tax commission, and that had it given notice of assessment to the vendors based upon composite consideration of all of them, it would not have offended or disregarded the opinion of the attorney general because, obviously, it had information over and beyond that which was before it as a result of its spot checks. Likewise, the referee in this case, and the court have access to and must take advantage of all of the information provided by the aforenumbered items. The referee's report does not rely solely upon the spot checks because the result there obtained was that the fair tax against the vendors in this case would have been 3.3%. The rate fixed by the referee is 3%.

There is no disagreement among counsel for the parties, nor the parties themselves, as to the applicability of General Code 5546-9A which fixes personal liability against the vendors for failure to collect the tax imposed, or having collected tax, failure to cancel the prepaid tax receipts in the manner prescribed by the act, and, further, that the

last paragraph of General Code 5546-2 providing that "it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established" has application and places the burden upon the vendor when notice of assessment has been properly given to establish that it is not subject to the tax. It is urged, however, that although full application be given to the section, the tax commission has no means of determining the rate upon which the tax shall be computed because it is a transaction tax varying with the bracket in which the transaction is to be found.

It is not necessary in this case to give application to the last paragraph of General Code 5546-2 as to all sales made by the vendors herein, because all reports demonstrate that there is available the total taxable sales, excepting only the amount of sales representative of items retailing at prices under 9 cents. Is this an insuperable barrier to a fair determination of the amount of the tax due on specific sales? We think not.

We have the sum total of the sales appearing in the St-10 reports and in the reports of the auditors of the tax commission and by virtue of the itemization and by the presumption indulged by the last paragraph of General Code 5546-2 the total taxable sales. Obviously, this is made up of specific taxable sales. This must be true because, if all the sales are under the statute presumed to be taxable sales, then all the parts which make up the total must be presumed to be taxable sales.

Let us then examine the mathematical probabilities under the rates fixed in the various brackets in General Code 5546-2.

Upon specific sales of $1.00 or less, the tax would equal or exceed 3%, in all instances, except in sales from 34¢ to 40¢ and in sales from 67¢ to 70¢. In the 91 units from 9¢ to $1.00 there are but 11 units wherein the tax would be

less than 3%. In the units above $1.00 the percentage would be the same. On a sale of 9 cents the percentage is more than 11%. On a sale of 10¢ the percentage is 10%; on sales from 11¢ to 19¢, inclusive, more than 5%; 20¢ to 30¢, more than 3%; 41¢ to 50¢, 4% or more; 50¢ to 66¢ more than 3%; 71¢ to 75¢ more than 4%; and 76¢ to 99¢ more than 3%. *The lowest tax percentage is 2.50 on a sale of 40¢ but on 41¢ it is 4.87%; on 70¢ it is 2.857% but on 71¢ it is 4.225%. The referee finds that the The Great Atlantic & Pacific Tea Company cancelled stamps in approximately 2.47% of the taxable sales, the Kroger Company, in 2.50% of its taxable sales.*

Upon the spot checks of grocery concerns, as we have heretofore indicated, it developed that upon all taxable sales and including exempt sales up to 9¢, the tax averaged 3.30%. So that, if it were possible to break up the total amount of taxable sales into specific sales and compute the tax thereon, the sum total of the tax so computed would, in all probability, exceed the amount of tax found to be due upon the basis of 3% of the total taxable sales appearing in the St-10 reports, or in the reports of the auditors of the commission, indulging the presumption required by the statute. This conclusion, independent of the presumption of the statute, is reached by the attorney general in his opinion and, likewise, is testified to by the defendant, William Evatt, tax commissioner.

How then, can it be maintained by the defendants that a prima facie case, at least, is not made against the vendors which is, under the statute, sufficient basis for an assessment? The mere fact that in reaching the total tax due, the mechanics employed by the state may not be in strict conformity to the letter of the bracket part of General Code 5546-2, does not change the fact that it is in complete harmony with the last paragraph of the section and the spirit of the whole act, and more important, will not, in probability, require the vendors to pay any tax

that they do not owe. If the vendors insist that they are taxed in a sum in excess of that which would be due upon a strict computation of tax upon specific sales, the obligation is upon them, under the statute, to show it and they are clearly accorded this privilege by General Code 5546-9a.

Let us assume that a grocer does $10,000.00 worth of business, but accounts for only one-half of 1 per cent of total sales. Under the statute there is a presumption that all of these sales are taxable. The state has no means of determining and separating the specific sales. Can it be the intent of the law that in this situation the tax commissioner may not make an assessment for sales tax due against this vendor? We do not believe that such is the intent of the law. If this vendor was given notice of his assessment and upon application for reassessment established that of the $10,000.00 total sales $5,000.00 were exempt under the ten specific exemptions of the statute and not taxable because of sales under nine cents, could it then be successfully urged that he was not liable in excess of 1 per cent of the remaining $5,000.00 taxable sales? We believe not.

As the referee well says: "The fact is that it was possible for vendors to keep detailed records, but impossible for examiners to accurately audit records which were not accurately kept in detail." That data for such detailed records was available to the vendors appears from those St-10 reports which are complete in every detail and set forth all exemptions allowable under the statute.

The intendment of the last paragraph of General Code 5546-2 is plain and the burden there is clearly placed upon the vendor. Once the tax commission has acted upon any information "within its possession or that shall come into its possession" and made an assessment upon such information, the burden is upon the vendor to prove that such assessment includes tax upon the sale price of any one of the ten exempted articles set out in the section or in-

cludes tax upon retail sales of articles wherein the price is less than 9¢, or both. If the act is not so construed then any vendor could, by the mere subterfuge of failure to keep any itemization of exempted sales or sales under 9¢, avoid any personal liability whatever for sales tax because thereby the state would be prevented from making any determination of the amount due on specific individual sales, the price of which brought them within the taxable brackets of General Code 5546-2.

It has been urged that to grant the writ of mandamus in the instant cause would be an invasion of the discretion vested in the defendant, the tax commissioner, under the law. We do not conceive that this case upon the facts presents a question involving the field of discretion of the tax commissioner. It is one where the former tax commission has, in interpreting the opinion of the attorney general, concluded that, under the facts, the law would not authorize any further procedure on his part, and the present tax commissioner has followed the ruling of his predecessor. In taking this position it is not predicated on any exercise of discretion but upon interpretation of the law. If the tax commissioner is mistaken in his conclusion of the law, clearly it becomes his obligation to act under the law in the light of its true meaning. We have recognized this principle of law in *State, ex rel. Breidigan v. Industrial Commission*, 36 Abs., 160, fourth syllabus, opinion by Judge Barnes, and concurrence by other members of the court as now constituted. It is our conclusion that the findings generally of the referee should be approved and confirmed with the following modifications:

Finding of Fact No. 6 obviously is in error, probably a typographical mistake, as to certain figures therein set out. It should read,

> "An audit was made of the business of the Great Atlantic and Pacific Tea Co. for the period beginning January 27, 1935, to December 28, 1935, which

audit became information that that vendor had sold taxable merchandise during that period in the sum of $50,145,637.10, and that the exempt sales amounted to $5,703,294.98, and that the net taxable sales for the period was $44,442,342.12 and that the stamps cancelled were $1,098,118.44 which is approximately 2.47% of the taxable sales."

The reference to the obligation of the examiner in Finding of Fact No. 20 to execute an "Actual Rate Chart" and, likewise, the conclusion of law under No. 4 that there devolved upon the defendant the clear legal duty to execute an "Actual Rate Chart" should be deleted. The order of this Court will be made with these modifications in mind. With these exceptions the motion to confirm the finding and report of the master will be sustained and the motion to disaffirm the report will be overruled.

A writ of mandamus may issue as prayed directing the defendant, William S. Evatt, tax commissioner, to make an assessment against the vendors herein, and to give notice thereof to said vendors, based upon information in his possession, as herein defined, and computed upon the basis of 3% of the sales shown to be taxable and, thereafter, to take such additional administrative steps as shall be necessary to collect final deficiency assessments under the sales tax act as found in House Bill No. 134, General Code 5546-1 *et seq.*, 115 Ohio Law, Part II, pages 306 *et seq.*, and in accordance with the finding and report of the master as herein confirmed.

Barnes, *P.J.*, Hornbeck and Geiger, *JJ.*, concur.

No. 1036.

Supreme Court of the United States

OCTOBER TERM, 1944.

THE STATE OF OHIO, EX REL. HUGH M. FOSTER,
Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF OF RESPONDENT.

HUGH S. JENKINS,
Attorney General,
AUBREY A. WENDT,
Assistant Attorney General,
Attorneys for the Respondent.

SCHIRMER LAW PRINTING COMPANY, Columbus 15, Ohio.

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Cases and Authorities Cited.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1036.

THE STATE OF OHIO, EX REL. HUGH M. FOSTER,
Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF OF RESPONDENT.

OPINIONS AND DECISIONS OF LOWER COURTS.

This matter was originally presented to the Supreme Court of Ohio in an action seeking a writ of mandamus and was decided against the relator on a demurrer to the first amended petition on February 21, 1940, in the case of **State, ex rel. Foster, v. Miller**, 136 O. S., 295, 25 N. E.

(2d), 686. A second amended petition was stricken from the files. A third amended petition was submitted to the court for leave to file the same and, on consideration, such leave was denied on December 31, 1940, as shown in **State, ex rel. Foster, v. Miller**, 137 O. S., 503, 30 N. E. (2d), 992. An application for rehearing was denied without opinion on January 22, 1941. Two days prior thereto, to wit, on January 20, 1941, the relator commenced a second action in the Court of Appeals, Second Appellate District of Ohio, also seeking a writ of mandamus to compel a similar assessment as sought in the first action, but for the year 1935 only. On September 8, 1943, the Court of Appeals journalized its unreported decision rendered on August 2, 1943, allowing the writ in part. On appeal to the Supreme Court of Ohio, the decision of the Court of Appeals was reversed and the cause dismissed on August 9, 1944, in the case of **State, ex rel. Foster, v. Evatt**, 144 O. S., 65, 56 N. E. (2d), 265. (Appendix A). An application for rehearing and a motion to vacate this judgment were thereafter filed, each suggesting that one of the judges who participated in the decision was disqualified because of a personal interest in the outcome and the relator thereby deprived of due process in violation of the Fourteenth Amendment. The application was denied without opinion on November 22, 1944. On December 20, 1944, the motion to vacate was overruled without opinion, Hart and Turner, judges, not participating.

STATEMENT OF THE CASE.

The case at bar is a sequel to an action, filed early in the year 1939 in the Supreme Court of Ohio, in which the relator in the instant case was also the relator and the Tax Commission of Ohio, the predecessor to the respondent in the instant case, was the principal defendant, which action sought a similar writ in mandamus with respect to sales tax collections during the calendar years 1935 and 1936. Two days before the Supreme Court held that the petition and amended petitions filed therein, which were similar to the petition in the instant case, did not state a cause of action, the present action was filed in the Court of Appeals of the Second Appellate District of Ohio seeking a writ in mandamus to compel the tax commissioner to make an assessment of sales tax against vendors of tangible personal property at retail in the state of Ohio for the year 1935 in an amount equal to three per cent of the gross receipts of such vendors from sales of tangible personal property not specifically exempted from the tax by the provisions of the Ohio Sales Tax Law of 1935 (Section 5546-1, et seq., Ohio General Code), less the amount of sales tax evidenced by the cancellation of prepaid sales tax receipts, as provided by Section 5546-3 of the Ohio General Code, during the year 1935.

In the earlier action instituted in the Ohio Supreme Court by the relator, Judge Zimmerman, at the time of one of the hearings, announced that he and his family were lessors under a lease to the Great Atlantic & Pacific Tea Company, which was one of the parties defendant in such action. All parties waived any objection and re-

quested his participation in the consideration of the case. Judge Turner, whose right to participate in the decision in the instant case has been challenged, was not a member of the court at the time of the hearing of the earlier case, which is reported, as to the decision on the demurrer, in **State, ex rel. Foster, v. Miller**, 136 O. S., 295. However, after Judge Turner became a member of the court, upon the hearing of a motion to a subsequent amended petition, on November 14, 1940, he disclosed to the parties his relationship which is now complained of, as lessor to the Kroger Grocery & Baking Company, also a defendant in such action. (See affidavit of Judge Turner, R., Vol. III, 931.)

On the call of the instant case by the Ohio Supreme Court, Judge Turner announced that he had purchased a property in which the Kroger Grocery & Baking Company was a tenant under a lease which provided for a rent under the flat fee rental basis plus a percentage of the annual gross retail sales in excess of the stated amount. The relator was present in the court room with Mr. I. B. Hart, one of his counsel, and with counsel for the tax commissioner. When the chief justice inquired as to whether there was any objection to Judge Turner's participation, counsel for the relator and counsel for the defendant each expressly waived any objection which they might claim with respect to Judge Turner's participating in the consideration of the case. Later, during the opening statement of the appellant, the other counsel for the relator, Mr. Bigger, came into the court room, but at no time during the argument, in which he participated, or at any time thereafter, prior to the pub-

lishing of the opinion of the Supreme Court, was any objection or complaint made to Judge Turner's or any other judge's participating in the consideration of the case. After the announcements of the decision of the court, the relator filed a motion to vacate the judgment of the court and later filed an application for rehearing. On October 4, 1944, the motion to vacate the judgment was stricken from the files and leave was granted to file a substitute motion if desired. Such substitute motion to vacate the judgment and the application for rehearing were respectively overruled and denied on November 22, 1944. On December 13, 1944, a motion by appellee for an order setting aside the entry of November 22, 1944, overruling the motion to vacate judgment was sustained and thereafter oral argument was heard on said motion to vacate the judgment, and on December 20, 1944, it was overruled by the court, Judges Hart and Turner not participating. Thereafter, on the twelfth day of March, 1945, a petition for a writ of certiorari was filed in this court.

SUMMARY OF ARGUMENT.

I. The relator is estopped from claiming any disqualification of Judge Turner, for the reason that at the outset of the hearing in the Supreme Court of Ohio Judge Turner stated the nature of his interest as a lessor to the Kroger Grocery & Baking Company and upon inquiry of the chief justice, counsel for the relator stated that the relator had no objection to Judge Turner's sitting and requested that he participate in the decision.

II. The decision could not have resulted in any pecuniary loss to Judge Turner for the reason that the lease provided for a flat rental, plus a percentage of annual gross sales, without any deduction for taxes of any kind. After the expiration of the lease Judge Turner called for an accounting from the Kroger Grocery & Baking Company, which was had and to which he agreed, thereby making a full and complete settlement with the grocery company (R., Vol. III, 931). Even though such settlement had not been made, the gross sales would have remained the same and his rental therefor the same. A deficiency sales tax assessment against the Kroger Company might have decreased the net profits, but Judge Turner's rental, being based on a percentage of gross sales, would not have been affected by a reduction in net profits.

III. Where the state constitution and laws make no provision for a substitute judge, a judge should not refuse to participate if his participation is essential to a decision, merely because a litigant objects or because he prefers not to sit. Such preferences will not excuse him

from performing his official duties which sovereignty has assigned to him.

IV. There is no error in the decisions of the Supreme Court of Ohio, for during the year 1935 the law neither imposed the duty on the Ohio taxing authorities nor did it grant the power to make the assessment in the amount or in the manner sought by the relator.

ARGUMENT.

I.

The Parties in the Case Below Waived Any Claim of Disqualification of Judge Turner at the Time of Hearing.

In **Tari v. State**, 117 O. S., 481, it is held that if a trial judge had such an interest in a case as would otherwise disqualify him from hearing and determining the case, such disqualification is waived unless objection is made thereto at the earliest available opportunity (see second paragraph of syllabus). The opinion in such case was written by the then Chief Justice Marshall who reasoned, at page 491, as follows:

> "While it is well settled that jurisdiction over the subject matter cannot be conferred by consent, it is equally well settled that a submission on the part of a defendant without objection to being tried completes the jurisdiction over the person, and it is conclusively settled that such submission, followed by an actual trial and judgment, renders the judgment a finality, not subject to collateral attack, and not subject to direct attack in an error proceeding, unless the question was raised and the objection made in the trial court at or preceding the trial."

On page 496, he stated:

> "From the foregoing authorities and by the overwhelming weight of all authority, it is clear that the sound rule is that matters of interest or bias, or prejudice of the judge, except where it amounts to actual fraud, are to be regarded as private matters, concerning only the parties to an action, and not affecting public policy. Such matters affect only the qualification of the judge, and, if they affect the jurisdiction at all, they must relate only to the jurisdiction over the person, and not to the jurisdiction over the subject matter of the action.
>
> By a like overwhelming authority, they are matters of privilege, and, whether they are guaranteed by a constitutional or statutory provision, or by some principle of the common law, the privilege is regarded as waived, unless claimed at the earliest available opportunty."

And on page 497 as follows:

> "If the disqualification of a judge by reason of interest should be held in every instance to destroy the jurisdiction of the court, and to render the judgment null and void, the finality of judgments would be seriously jeopardized. The party whose interests are adversely affected would in every instance decline to raise the objection and seek to prevail on the merits of the case, and, if unsuccessful, enjoin the execution of the judgment in a collateral proceeding. A judgment which is absolutely null and void for want of jurisdiction of the court to render it is not binding upon either party. Estoppel would not apply. A plaintiff after defeat could immediately institute another action, and former adjudication could not be pleaded."

Not only does the rule announced in **Tari v. State**, supra, appear to be the law in Ohio, but it appears to be the rule in other jurisdictions. In 30 Am. Jur., 800,

"Judges," Section 95, the learned author states the rule as follows:

> "* * * where the disqualification is known to the complaining party at or before the trial, it is generally deemed to be waived, or that an estoppel arises, where no objection is made in the trial court, or by appearing before the judge and proceeding with or contesting the case, or permitting it to proceed to judgment without objection, or where the objection is first made subsequently to the making of rulings in the case involving the exercise of judicial discretion, or on a motion for a new trial."

See also 23 O. Jur., 458, "Judges," Section 107, and notes in 5 A. L. R., 1588, and 57 A. L. R., 292; **Klose v. United States**, 49 Fed. (2d), 177.

It should be remembered that after Judge Turner had made a complete disclosure of the facts complained of, the chief justice inquired specifically as to whether there was any objection to the participation by Judge Turner in the consideration of the instant case, and that not only did no party raise an objection but counsel for both parties announced in open court that they had no objection to such participation and requested the same.

If we were to assume that the matters complained of amounted to an interest in the case on the part of Judge Turner, then since, prior to the institution of the case at bar in the Court of Appeals, all the facts with respect to the interest of Judge Turner were known by all of the parties to the case and their counsel (with the exception of Mr. I. B. Hart, who expressly waived his objection at the time of the hearing after a second disclosure by Judge Turner), it would seem that it was the duty of such parties to have made such objection at the com-

mencement of the hearing by the Supreme Court. When the application for rehearing filed by the relator in the Supreme Court of Ohio and the brief in support thereof are read, we must conclude that it was only after the decision was rendered, but not before, that the relator came to the conclusion that he objected to participation by Judge Turner and that he would have preferred some other judge to have written the opinion. At no time prior to reading the decision did the relator express any concern over who should participate in the case. Since the objection was not made prior to the submission of the case and not until after the announcement of the decision, the relator thereby waived any objection to which he might have otherwise been entitled and must be deemed to have consented to the participation of Judge Turner in the decision.

II.

The Facts Alleged Do Not Show Any Interest of Judge Turner Which Would Disqualify Him From Participation in the Consideration of the Case.

To disqualify a judge from participating in the consideration and decision of a cause on the ground of interest, it is necessary that the result of the decision must directly affect him to his pecuniary loss or gain or so affect his property. **Love v. Wilcox**, 119 Tex., 256; **Sioux City v. Western Asphalt Paving Corp.**, 223 Iowa, 279; **Metsker v. Whitsell**, 181 Ind., 126; **State, ex rel. Seiders v. Bangor**, 98 Me., 114; **Foreman v. Marianna**, 43 Ark., 324; **Ex Parte Harris**, 26 Fla., 77.

It is not contended that Judge Turner was a stockholder in any vendor subject to the Ohio Sales Tax Law. It is not contended that any such vendor was indebted to him. Such were not the facts. The alleged interest of Judge Turner is limited to that disclosed by him in his statement before and at the time of the hearing. Before the hearing and again at the time of the hearing, Judge Turner disclosed that during the month of June, 1935, he had purchased a building in which the Kroger Grocery & Baking Company was among the tenants. The grocery company's occupancy was under a lease which reserved a guaranteed annual flat rental, plus a percentage rental based on gross sales without any deduction for taxes of any kind, less however the cost of certain improvements. After the expiration of such lease and before the argument of this case on the merits, Judge Turner called upon the Kroger Company for an accounting. This showed

that the cost of repairs exceeded by $906.48 the rentals due Judge Turner under the percentage provision, which amount by the terms of the lease was cancelled. This accounting was accepted by Judge Turner and the liability between him and the Kroger Company for the year in question was fully settled. (R., Vol. III, 920.)

Even if there had not been a settlement between Judge Turner and the Kroger Company, his relationship under the terms of the lease could not be such as to constitute an interest in the outcome of this litigation. A decision resulting in a deficiency sales tax assessment against the Kroger Grocery & Baking Company for the year 1935, could not have affected Judge Turner's interest under the lease because the amount of gross sales would have remained the same, and his rental therefor would have remained the same. A deficiency assessment against the Kroger Company would probably have decreased the net profit of the Kroger Company from the operation of that particular store, but Judge Turner's rental would not have been affected in any manner by a reduction in such net profits.

III.

Judge Turner Had a Duty to Participate in the Decision of the Instant Case.

In our argument as hereinabove set forth, we have discussed the proposition of eligibility of a jurist to consider a case as though the judge in question was a trial judge, rather than a reviewing judge. It should be borne in mind that the Legislature has set up certain grounds which disqualify a trial judge from hearing a case for the possible reason that, in the opinion of the General Assembly, another trial judge may be assigned in his place. Such condition did not exist in Ohio with respect to judges of the Supreme Court.

As was stated by Otis, J., in **United States v. Pendergast**, 34 Fed. Supp., 269:

> "No judge should step aside from any case merely because a litigant prefers some other judge. The judge is not a referee selected by the parties. He is more than a referee and he is selected by the sovereign power of the nation. It is morally wrong for him to abandon the post the sovereign has assigned him except only when it is required by law."

Also, in the case of **State, ex rel. Mitchell, Atty. Gen., v. Sage Stores Co., et al.**, 157 Kan., 622, 143 Pac. (2d), 652, the court held as stated in the third and fourth paragraphs of the headnotes, as such case is reported in the Pacific Reporter:

> "Where Supreme Court justice, although not legally disqualified, prefers not to participate in a decision to avoid any possibility of suspicion of bias or prejudice, the preference may be recognized so

long as it does not result in denying to a litigant his constitutional right to have the presented question adjudicated, but when preference comes in conflict with official duty, the preference must yield.

Actual disqualification of member of court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated."

In the instant case, Judge Hart had declined to sit in the case since his son, Mr. I. B. Hart, was one of counsel for the appellee. If Judge Turner was ineligible to participate, by like reason Judge Zimmerman would have been ineligible to sit (which we do not now and never did believe to be either the fact or law), and there would have been a bare majority of the court which would have been eligible to participate. It could well be probable that some of the other members of the court were lessors of real property to lessees who were vendors of personal property at retail, which lessees necessarily would have been affected by the decision of the case below if they were in business during the year 1935.

If the argument of the relator is followed to its logical conclusion, no judge would be qualified to sit as a reviewing judge in any case in which any person or corporation might be affected if he were a lessor or had any contractual relationship with such person or corporation even though the outcome of the decision would not in any manner affect the jurist in the respect of any right under such lease or contract.

IV.

There Is No Error in the Decision of the Court Below.

The action for which the writ of certiorari is asked is one in mandamus, which arose as an original action in the Court of Appeals for the Second Appellate District of Ohio. An action for a writ in mandamus in Ohio is a statutory action. Sections 12283 to 12302, both inclusive, Ohio General Code. The writ will issue only to command an inferior tribunal, a corporation, a board or person to perform some duty which the law specially enjoins upon them as a result of or as an incident of their office, trust or station. Section 12283, Ohio General Code; **State, ex rel. White v. Cleveland,** 132 O. S., 111. It will not issue to control discretion placed in the officer by law. Section 12285, Ohio General Code: **State, ex rel. Methodist Children's Ass'n. v. Board of Education,** 105 O. S., 438; **Ex parte Black,** 1 O. S., 30; **State, ex rel. Ross, v. Board of Education,** 42 O. S., 374, 378. It does not lie where the performance of the act for which it is sought is not one which is specially enjoined by law to be performed by the defendant as a result of his office, trust or station. Section 12283, Ohio General Code; **Selby v. State,** 63 O. S., 541; **State, ex rel. Miller, v. Industrial Commission,** 128 O. S., 254; **State, ex rel. Brophy, v. Crawford,** 127 O. S., 580; **State, ex rel. Stranahan, Harris & Co., v. Backus,** 125 O. S., 115.

While under certain circumstances a writ of mandamus will issue to compel an administrative officer to use his discretion when a duty so to do is imposed upon him by statute, it will not be issued to compel him to use it in

any particular manner (Section 12285, Ohio General Code; **State, ex rel. White, etc., v. Jewell,** 132 O. S., 300; **State, ex rel. Frye, v. MacConkey,** 136 O. S., 462), such as sought in the case at bar or to correct errors in his use of the discretion imposed upon him by statute. **State, ex rel. Miller, v. Industrial Commission,** 128 O. S., 254, 256; **State, ex rel., v. Crites,** 48 O. S., 142. Nor can the court in issuing the writ substitute its discretion for that of the officer. **State, ex rel. Christman, etc., v. Skinner,** 127 O. S., 55.

Under the guise of a writ in mandamus it is not permissible for the court to create a duty and thereupon issue a writ in mandamus to enforce its performance; the duty for which the writ is issued must have existed by virtue of some statutory enactment. **Davis, Mayor, v. State, ex rel. Pecsok,** 130 O. S., 411; **State, ex rel. White, v. City of Cleveland,** 42 O. App., 72.

In the case at bar, a writ in mandamus is sought to compel the tax commissioner to make an assessment of sales tax against vendors of tangible personal property at retail in Ohio for the year 1935 in an amount equal to three per cent of the gross receipts of such vendors from sales of those classes of tangible personal property not specifically exempted from tax by the provisions of the Ohio Sales Tax Law of 1935 (Section 5546-1, et seq., Ohio General Code), less the amount of sales tax represented by the cancellation of prepaid sales tax receipts as provided by Section 5546-3, Ohio General Code, during such year 1935.

The Ohio Supreme Court held, in denying the writ in mandamus, that with respect to the sales of tangible personal property at retail during the year 1935 the law

neither imposed a duty upon the tax commission or tax commissioner nor did it grant them the power to assess a tax of the amount or in the manner sought by the relator and that for such reason the writ could not issue. See **State, ex rel. Foster, v. Evatt, Tax Commissioner,** 144 O. S., 65. In its opinion (page 103), the court directed attention to the fact that presently existing Section 5546-12a, Ohio General Code, if it had been in effect during the year 1935, would have authorized and required the tax commission to have performed the action for which the writ is sought; it further directed attention to the fact that such Section 5546-12a, Ohio General Code, was not in effect during the year 1935 and, in fact, was not enacted by the General Assembly until December 22, 1936 (116 O. L., pt. 2, 333). See page 103 of court's opinion. The Supreme Court of Ohio had, prior to the institution of the instant case, laid down the rule which it reiterated in the opinion complained of. See **State, ex rel. Foster, v. Miller,** 136 O. S., 295.

In the case of **State, ex rel. Foster, v. Miller,** 136 O. S., 295, the court had held (at a time when Judge Turner was not a member of the court) that during the year 1935 the Ohio Sales Tax Law levied only a tax on each individual sale of tangible personal property at the rates and as specified in Section 5546-2, Ohio General Code, and that, in the absence of evidence of specific sales with respect to which no tax was paid, the tax commissioner had no authority to make a deficiency assessment and that a writ of mandamus could not be issued to compel him to make the assessment which he had no authority by law to make. Such was the holding of the Supreme Court of Ohio in **State, ex rel. Foster, v. Miller,** 136 O. S.,

295, when Judge Turner was not a member of the court, and such was the holding of the court in **State, ex rel. Foster, v. Evatt,** 144 O. S., 65.

An examination of the Ohio Sales Tax Law as it existed during the year 1935 will disclose that no levy of tax was made by such law other than that levied by Section 5546-2, Ohio General Code, which levied a tax with respect to sales transactions in excess of nine cents at the following rates: On sales transactions at prices between nine cents and forty cents, one cent; on sales transactions at prices from forty-one cents to seventy cents, two cents; and on sales transactions at prices from seventy-one cents to one dollar and eight cents, three cents; and similarly on sales transactions in excess of one dollar and eight cents.

Section 5546-3, Ohio General Code, required the vendor to prepay the tax by purchasing from the treasurer of state prepaid sales tax receipts which he was to cancel in the presence of the purchaser and deliver one-half thereof to the purchaser upon being reimbursed for his advancement at the rates specified in Section 5546-2, Ohio General Code. Section 5546-12, Ohio General Code, authorized the tax commissioner to require the vendor to preserve his sales records for a period of three years and if upon the commissioner's audit it was determined that the vendor did not cancel sufficient stamps with respect to the sales transactions made by him, to collect such deficiency from the vendor with a penalty of fifteen per cent. In the case at bar, no evidence of any specific sales transaction was produced; no evidence was produced of any sales transaction in which the vendor failed to cancel prepaid sales tax receipts in the amount and as

required by Sections 5546-3, Ohio General Code. No evidence was presented of any transaction in which any vendor had collected a tax for which it did not account. And no knowledge of any such practice was known to the commissioner. Evidence was introduced which had a tendency to indicate that the tax commission attempted to make a deficiency assessment against certain vendors for the year 1935, using as a basis therefor a weighted average rate which the commission thought should equal the amount of revenue which the commission believed should have been produced by the sales tax law. When such attempt was made, certain taxpayers questioned the legality thereof; whereupon, the tax commission requested an opinion of the attorney general, who ruled the procedure unauthorized. The commission thereupon, in the exercise of its discretion and upon the advice of the attorney general, determined that no deficiency of tax was due from vendors with respect to the year 1935 unless it found evidence of specific or individual sales transactions in which proper face amounts of prepaid sales tax receipts had not been canceled. Such was the correct interpretation of the Ohio Sales Tax Law of 1935 as was determined by the Supreme Court of Ohio in 1939 in the case of **State, ex rel. Foster, v. Miller,** 136 O. S., 295, decided before the instant case was instituted and again in the instant case. The tax commissioner had used his discretion. Can he be compelled in mandamus to use it in another manner without evidence of an abuse of discretion as in the case at bar?

CONCLUSION.

Under the Constitution and laws of the State of Ohio, there could have been no substitute judge assigned to the case. It was the duty of each judge to cast aside any inconsequential personal considerations and participate in the decision. The decision itself was a correct decision under the facts and laws of Ohio. Although the court below gave the case full consideration, actually the matter at issue was res adjudicata, for the same issues between the same parties had been decided in the previous case.

The only federal question, if any, presented is whether or not the relator was deprived of any rights under the Fourteenth Amendment to the Federal Constitution because of Judge Turner's participation in the decision on the merits in this case by the Supreme Court of Ohio. From the foregoing, it must be concluded that he was not.

The question of whether or not Judge Turner had any interest in the case, even though all of the facts were known to all parties and counsel when the case was argued upon its merits, was not raised until after the decision on the merits. Thereafter, the question was raised on motion to vacate the judgment, supported by affidavits, and in an application for rehearing. Judge Hart did not participate in the judgment on the merits, and Judges Zimmerman and Williams dissented. The record shows that the application for rehearing was denied by the court. Judge Turner's participation in the ruling on this application was therefore of no moment.

The record on the motion to vacate the judgment shows that Judge Turner had absolutely no pecuniary interest in the matter before the court on the merits because: (1) he previously had made a complete settlement with his lessee; and (2) had he not so settled, the decision of the court on the merits could not in any manner have affected the amount of rentals he was entitled to receive under the terms of the lease. All of the judges of the Supreme Court, except Judges Turner and Hart who did not participate, and including Judges Zimmerman and Williams who dissented to the judgment on the merits, must have so decided when they joined in overruling the motion to vacate the judgment. (R., Vol. III, 910.)

Every consideration that may be given to the relator's petition leads to the conclusion that his claim is frivolous. No federal question is truly raised. His petition should be denied.

Respectfully submitted,

HUGH S. JENKINS,
Attorney General,
AUBREY A. WENDT,
Assistant Attorney General,
Attorneys for the Respondent.

APPENDIX A.

Opinion—Supreme Court of Ohio.

Syllabus.

1. Under Section 9a of the Sales Tax Act, effective during the calendar year 1935 (115 Ohio Laws, pt. 2, 306 **et seq.**), a penalty was provided against a vendor for failure to collect the tax, or, where he had collected the tax, for failure to cancel the required prepaid tax receipts. The amount of such penalty was to be measured by the amount of tax such vendor failed to collect or for the amount of prepaid tax receipts which he failed to cancel. To establish such personal liability against a vendor, proof must be made of a specific taxable sale or sales upon which the vendor failed to collect the tax, or having collected the tax failed to cancel the proper amount of prepaid tax receipts.

2. Under such Sales Tax Act a tax was levied on each retail sale of tangible personal property not specifically exempted, in an amount dependent upon the price paid. Such tax was to be paid by the purchaser and collected by the vendor, except as provided in Section 5 of the act.

3. Where a specific retail sale of tangible personal property is shown to have been made by a vendor during the year 1935, such sale is presumed to be subject to the tax levied by Section 2 of such Sales Tax Act and the burden of proof to establish the contrary is upon the vendor.

4. Under such Sales Tax Act no authority was conferred upon the Tax Commission of Ohio to assess a vendor according to the average percentage of tax collectible from purchasers on taxable retail sales by other

vendors in like business or by the mathematical probabilities, demonstrated by the bracket tax rates in Section 2 of such act, that the tax collectible on taxable retail sales made by vendors during the year 1935 could not be less than three per cent.

5. The Sales Tax Act effective during the calendar year 1935 did not levy or authorize the levy of a tax on vendors. No tax levy on vendors was provided prior to the enactment by the 91st General Assembly of Section 5546-12a, General Code. (116 Ohio Laws, pt. 2, 77 and 333.)

6. No duty rests upon the Tax Commissioner to levy an assessment against a vendor on account of sales of tangible personal property made during the year 1935 unless such Tax Commissioner is in possession of evidence showing a specific retail sale or sales of nonexempt tangible property upon which the tax was collected by a vendor but for which the proper amounts of prepaid tax receipts were not cancelled by the vendor or for which no tax was collected or prepaid tax receipts cancelled.

7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (**Slingluff v. Weaver**, 66 Ohio St., 621, approved and followed.)

8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.

9. The General Assembly cannot delegate legislative power to an administrative body and any enactment

which in terms does so is unconstitutional and void. (**Matz v. The J. L. Curtis Cartage Co.**, 132 Ohio St., 271, approved and followed.)

10. Under Section 5623, General Code, it was the duty of the Tax Commission of Ohio and is now the duty of the Tax Commissioner to decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the Attorney General, unless and until such advice and opinion has been annulled or modified by a court of competent jurisdiction.

11. An action in mandamus, to compel a board or officer to perform a duty allegedly enjoined by statute, is a proper proceeding in which to secure the annulment or modification of an Attorney General's advice or cause was tried, in addition to reciting various sections

Statement of the Case.

This case was filed originally in the Court of Appeals seeking a writ of mandamus to compel the Tax Commissioner, as successor of the Tax Commission of Ohio, to make an assessment against each The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company based upon information in the possession of the respondent.

Plaintiff's second amended petition upon which this cause was tried, in addition to reciting various sections of the 1935 sales tax law and alleging that The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company were vendors under that act, alleged that the auditing department of the sales tax section of the Tax Commission under the direction of

the chief auditor for the Tax Commission had made an audit for the year 1935 of the books and records and of the records of specific taxable retail sales made by each and all of the more than two thousand retail stores operated in Ohio by The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company, the report of which audits was delivered to the Tax Commission and which report established that The Kroger Grocery & Baking Company was liable to the state under the provision of Section 9a of the Sales Tax Act for the period of January 27 to September 7, 1935, in the amount of $164,612.17 and that The Great Atlantic & Pacific Tea Company was similarly liable for the period of January 27 to December 28, 1935, in the amount of $276,101.28; and that such report was in the possession of appellant as successor of the Tax Commission of Ohio. It was also therein alleged that the Tax Commission and the Tax Commissioner had arbitrarily failed to make assessments for the reported liability of The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company. After asking for costs and attorney fees, the second amended petition prayed for a writ of mandamus to issue against appellant as Tax Commissioner "requiring him to make an assessment against The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, as vendors, under the Sales Tax Act, effective January 1, 1935 (Sections 5546-1 to 5546-23, inclusive, General Code), based upon the information now in the possession of said defendant as provided by Section 5546-9a of the General Code of Ohio, effective January 1, 1935, that costs may be assessed including an allowance for counsel fees as herein

set forth, and for such other relief in the premises as may be just and proper."

Appellant Tax Commissioner, in his answer to the second amended petition, specifically denied that he was or ever had been in possession or control or that he had any knowledge of the existence of any information showing or tending to show that The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, or either of them, collected moneys purported to be in payment of sales tax from customers during the year 1935 for which they, or either of them, failed to cancel prepaid sales tax stamps or to pay such money into the state treasury or that they, or either of them, made taxable sales of personal property during the calendar year 1935 for which they, or either of them, collected sales tax revenue which they, or either of them, did not pay into the state treasury.

Appellant further denied in his answer that any audit had been made supporting a finding that The Kroger Grocery & Baking Company or The Great Atlantic & Pacific Tea Company was indebted to the state under authority of the Sales Tax Act. Appellant's answer also contained the following:

"Defendant, further answering, says that the Tax Commission of Ohio delivered to the Department of Taxation at the time of its creation records purporting to be the records of such commission which reflect that such commission made a determination with reference to the question as to whether moneys were due from such named corporations and reflected a finding and determination of such commission that no moneys were due therefrom for the year 1935. Defendant further says

that in the creation of the office of Tax Commissioner the Legislature did not give to such office or officer the right to review and redetermine the determinations of the former Tax Commission which were not then pending but had been completed and no appeal prosecuted thereto.

"Defendant further says that he has no knowledge of the existence of facts which would justify a determination that moneys are due from such corporations for taxes or other obligations incurred during the year 1935, and that even if the court should determine that he has the power to make an assessment upon the existence of facts sufficient to justify it, he could not in good faith make such an assessment."

As a second defense appellant set up the plea of res judicata based upon the case of **State, ex rel. Foster, v. Miller et al., Tax Commission**, 136 Ohio St., 295, 25 N. E. (2d), 686.

The Court of Appeals allowed an alternative writ of mandamus. Upon the application of relator, a special master commissioner was appointed to take the testimony in writing, report it to the court together with his conclusions on the law and facts involved in the issues. Thereafter such master commissioner made application therefor and was "invested with all the powers of a referee in chancery."

The special master commissioner took the testimony which was reported to the court together with his conclusions of fact and law. With some exceptions the master's report was approved and the Court of Appeals ordered that a writ of mandamus issue as prayed for in relator's second amended petition directing appellant to

make assessments against The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company.

This case having originated in the Court of Appeals, the appeal to this court was taken as of right.

In December 1934, the 90th General Assembly enacted an act providing for the levy and collection of a tax upon sales of tangible personal property at retail. The act was limited so as to apply only from the first day of January 1935, to and including the 31st day of December 1935. (115 Ohio Laws, pt. 2, 306 **et seq.**)

Section 10 of the act provided that:

"No person shall engage in making retail sales as herein defined, as a business, without having a license therefor * * *."

Such licensee, or vendor as he will hereafter be called, was required to purchase and have on hand at all times prepaid tax receipts in suitable denominations and in amount sufficient to supply the normal requirements of his business.

Section 12 required such vendor to keep records of sales, together with invoices, bills of lading, retained parts of cancelled prepaid tax receipts, and such other pertinent documents, in such form as the commission might by regulation require. These records were to be open to inspection by the Tax Commission and were to be preserved for the period of three years.

Section 15 of the act made it a misdemeanor for a vendor to fail, neglect or refuse to collect the full and exact tax required by the act or to hold out that he was absorbing such tax for the consumer.

However, under Section 5 of the act the Tax Commission of Ohio was empowered to authorize a vendor to prepay the tax levied, and to waive the collection of the tax from the consumer, in cases where the Tax Commission determined that the conditions of the applicant's business were such as to render impractical the collection of the tax in the manner otherwise provided by the act.

Section 2 of the act provided as follows:

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, with the exceptions hereinafter mentioned and described, as follows:

"One cent, if the price is forty cents or less;

"Two cents, if the price is more than forty cents and not more than seventy cents;

"Three cents, if the price is more than seventy cents and not more than one dollar;

"If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price

is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.

"If the price is less than nine cents, no tax shall be imposed.

"The taxes hereby imposed shall apply and be collected when the sale is made, regardless of the time when the price is paid or delivered.

"In the case of a sale as herein defined made during said period, the price of which as herein defined consists in whole or in part of rentals for the use of the thing transferred, the taxes hereby imposed shall, as regards such rentals, be measured by the instalments thereof falling due within said period only.

"The tax hereby levied does not apply to the following sales:

"1. When the consumer is the state of Ohio or any of its political subdivisions.

"2. When the vendor is a farmer, the thing transferred is the product of his own farm, or of a farm which he operates, and the retail establishment is located on such farm, or when the sale is of feed, seeds, lime or fertilizer.

"2a. Sale of fluid milk defined by the milk marketing act for consumption off the premises of the vendor and of bread in loaf form.

"2b. The sale of newspapers.

"3. Sales of motor vehicle fuel and of liquid fuel upon the receipt, use, distribution or sale of which in this state a tax is imposed by the law of this state.

"4. Sales of cigarettes and of brewer's wort and malt, upon the sale of which a tax is imposed by law of this state, so long, respectively, as such law is in force.

"5. Sales of beer as defined by Section 6212-63 of the General Code, whether in bulk or in bottles, sales of wine, and sales of spirituous liquors by the Department of Liquor Control.

"6. Sales of artificial gas by a gas company as defined in Section 5416 of the General Code, of natural gas by a natural gas company, as so defined, of electricity by an electric light company, as so defined, of water by a water-works company, as so defined, if in each case the thing sold is delivered to consumers through wires, pipes or conduits; and all sales by any other public utility as defined in Section 5415 of the General Code.

"7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.

"8. Sales which are not within the taxing power of this state under the Constitution of the United States.

"Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property.

"9. Professional or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made.

"10. Tangible personal property sold by charitable and religious organizations, the income of which is used in philanthropic activities.

"For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

Section 3 of the act provided as follows:

"Excepting as provided in Section 5 of this act, the tax hereby imposed shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts, equal in face value to the amount thereof, in the manner and at the times provided in this section, to wit:

"(a) If the price is, at or prior to the delivery of possession of the thing sold, to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall:

"1. Collect the tax with and at the same time as the price.

"2. Immediately cancel in the presence of the buyer by immediately tearing into two parts a prepaid tax receipt or receipts of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

"(b) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold, to the consumer, cancel or cause to be cancelled by tearing into two parts

prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to such sale, payment of which to the state is evidenced by such cancellation, shall become a legal charge in favor of the vendor and against the consumer, which shall in every case be collected by the vendor, as herein provided, in addition to the price; and at or immediately after such collection, the vendor shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof."

Section 6 provided for the reimbursement of the vendor in case of returned goods.

Section 9a of the act provided:

"In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.

"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. The commission shall give to the vendor written notice of such assessment, together with written notice of the time and place where the vendor may be heard on a petition by him for reassessment. Such notice may be served upon the vendor personally or by registered mail.

"Any amount assessed by the commission under the provisions of this section, together with a penalty of

fifteen per centum thereof shall be due and payable from the vendor to the treasurer of state fifteen days after the service upon the vendor of notice of such assessment and when paid shall be considered as revenue arising from the tax imposed by this act.

"Any vendor, against whom an assessment is made by the commission under the provisions of this section, may petition for a reassessment thereof. Notice of intention to file such a petition or to appear and be heard shall be given to the commission prior to the time the assessment becomes due and payable. A petition for such a reassessment may be filed with the commission on or before the date designated in the notice of such assessment as the time when the vendor may be heard pn a petition by him for reassessment. Each such hearing shall be held at the time and place designated in such notice to the vendor, but the commission shall have power to continue the same from time to time as may be necessary. Each such petition filed with the commission shall set forth specifically and in detail the grounds upon which it is claimed the assessment is erroneous. If no petition for reassessment is filed with the commission, the vendor may nevertheless appear at the hearing and present his objections orally.

"All amounts assessed under this section, which are not paid to the Treasurer of State by the vendor on the date when the same become due and payable, shall bear interest at the rate of twelve per centum per annum from and after such date until paid.

"If any vendor against whom an assessment has been made by the commission, pursuant to this section, shall fail to give due notice of an intention to petition for

reassessment, or to file a petition for reassessment or to appear for hearing, the assessment shall be considered final. The commission by its deputy or deputies authorized by it for such purpose, shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty, on demand shall levy on the moneys, goods and chattels or other personal property of such person wherever found in this state. Such levy shall take precedence of all liens, mortgages, conveyances, or encumbrances hereafter taken on such moneys, goods and chattels, or other personal property. No property of any such person liable to pay the tax, penalty and costs shall be exempt from such levy.

"The commission shall give like notice of the time and sale of the personal property to be sold under this act as in the case of sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act, except as herein otherwise provided; all moneys collected by the commission shall be paid into the state treasury.

"The vendor may appeal from an assessment by the commission to the Court of Common Pleas in the same manner and form as that provided in Section 5611-2 of the General Code of Ohio."

The evidence before the special master commissioner disclosed that: There were approximately 300,000 vendors in Ohio who would have many millions of sales during the year 1935; as soon as the sales tax law was passed the Tax Commission began the organization of a department to carry out its provisions; some employees were transferred from other departments while

others were brought in from the outside. As described by some of the witnesses the procedure of the Sales Tax Division "evolved."

The commission issued auditing procedures which the auditors found could not be followed and which were later withdrawn. In this auditing procedure it was stated that the average rates developed from the ST 10 forms filed for the first period showed, Code 11, Grocery-Meat-Vegetable and Fruit Markets, a weighted rate of 3.301. However, some of these reports were found to be inaccurate. The witnesses testified that it was impracticable for a grocer to make a record of each sale.

For the administration of the law the Tax Commission prescribed a report known as ST 10 to be made at regular intervals by each vendor showing the amount of sales made during the period covered by the report. In seeking a basis for checking these ST 10 reports of vendors against the vendors' purchases of sales tax receipts the Tax Commission made a tabulation of the returns of various vendors together with some spot-checks, but no such spot-checks were made in any of the stores of Kroger or The A. & P.

The spot-check was described by the chief examiner of the Department of Taxation, Sales and Excise Divisions, as follows: "Spot-check would be where they would go in and take just a certain period or a certain part of a day, or part of a period and check for that period—we always check on every sale that would go through in that period."

The use of the data on the ST 10 reports was described by the Tax Commission's statistician as follows:

"A tabulation was made of the returns on the sales tax form of all vendors who reported on those forms by code classifications; the total amount of tax stamps cancelled during the period of the first report was divided by the net taxable sales, and a rate for checking purposes only was established. It was not intended at any time that that rate was to be an assessment rate."

By this method the employees of the commission arrived at two test percentages, to wit: 3% and 3.3%. With these test figures as guides as to whether an audi should be made, a large number of audits were undertaken in 1936 resulting in 4,014 proposed assessments. Contrary to the advice of the chief attorney of the Tax Commission some assessments were made. Under assessments made on this basis $187,671.25 was collected from various vendors and later refunded after the receipt by the Tax Commission of an opinion by the Attorney General. Among the audits so undertaken were those of The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company, each of which concerns had a large number of retail stores throughout Ohio.

On the recapitulation sheet prepared by one of the Tax Commission's examiners, and known as plaintiff's exhibit 13, being a recapitulation of the work sheets of several of the commission's auditors, there was indicated that a 3% rate with a 15% penalty on the sales of The Kroger Grocery & Baking Company for the year 1935 would amount to $164,612.17, while a rate of 3.3% applied to the Kroger sales, together with a 15% penalty, would amount to $265,669.40. The exhibit shows that in the Cincinnati district "10 representative stores of

different districts were taken for three periods," while for the Toledo branch which included stores in Michigan, "132/159 of total was used for Ohio stores." The exhibit purports to set up exempt sales and to give both gross sales and taxable sales. However, its author testified that the examiners "took all sales and exempted anything that was exempt, **not what they had, but what we thought in our opinion.**" (Emphasis ours.) Also introduced were auditor's work sheets and recapitulations concerning the incomplete audit of The Great Atlantic & Pacific Tea Company. These audits do not show individual or specific sales.

Before an assessment was made against The Kroger Grocery & Baking Company a conference was had in Cincinnati with that concern's attorney and Darold I. Greek, chief attorney for the Tax Commission. Attending the conference with Mr. Greek were the statistician and research man for the Tax Commission, the assistant to the chief of the Sales Tax Division of the Tax Commission, a supervisor of the Sales Tax Division, an examiner in the field audit section, and a field audit supervisor. The position of the attorney for The Kroger Grocery & Baking Company is disclosed by the following testimony developed by relator:

"Q. What was the Kroger Grocery & Baking Company through Mr. Marx objecting to about this audit? A. Their position was that this was a bracket tax and that the tax had to be determined upon the basis of the amount due on each individual sale.

"Q. And illustrating or enlarging upon that statement, what was said? A. It was their position that you could not take any arbitrary percentage figure and apply it to total sales to determine tax liability.

"Q. Is that all that was said about that now? A. I don't recall that was all that was said but that was the substance of their position.

"Q. What you are intending to convey to the court is that they objected to a rate of 3.3, or something like that, a weighted rate? A. They objected to any percentage for that reason because they said we did not determine the eight-cent sales, which would be exempt completely from the tax, and we had not and could not determine the number of forty-cent sales, which would be two cents, which is an equivalent of a 2½ per cent rate, and that was the basis of this objection; they said we could not apply the rate of three per cent or more.

"Q. Did they say they did not keep a record of exempt sales? A. They said the audit did not show the exempt sales, or all of the exempt sales. * * *

"Q. Did you make any inquiry as to their other grounds of complaint? A. I don't recall if I did or didn't; I contended that the audit made a **prima facie** case in view of the language I read awhile ago and Section 5546-9**a** of the General Code. * * *

"Q. * * * did you make—I believe you made the statement that the audit established a **prima facie** case for the basis of an assessment; did you say that? A. I said that was my contention.

"Q. Yes, that is what I mean, you said that was your contention. Now, if that be true, can you state why an assessment was not made upon that at that time? A. Yes, I can state why an assessment was not made. We considered the case at length and discussed it; we were not certain that we were right, and Kroger had made a definite statement that if we assessed the tax on the

basis of the audit they would contest it. Under the Ohio statutes the Attorney General was then, and I guess still is, the attorney for the tax officials, so we thought we should consult our attorney and see what he thought of the case. Following that, we requested an opinion as to the validity of assessments based upon audits such as we had in this case. The Attorney General's opinion ruled that such assessments were not valid. We felt we should not make an assessment in view of his opinion because we were bound under the statute to abide by the opinion until it was upset by a court of competent jurisdiction."

At another point this same witness testified in part: "I recall distinctly that Mr. Marx [attorney for Kroger] insisted that they would refuse to pay any assessment based upon that audit." In answer to the specific question: "Do you know, if it [assessment] was not made, why it was not made?"; the witness replied: "It was not made because of an opinion rendered by the attorney general."

The Tax Commission's statistician, when asked what took place at the meeting with the attorney for The Kroger Grocery & Baking Company, testified: "My position at that meeting was that of an observer; I was there to represent the Tax Commission; I was there to listen in more or less to what had to be said by both sides; I took no part or participated in any way, especially or formally, in the audit, the assessment or anything of that sort; at no time in all my years with the Tax Commission did I ever participate in audits or assessments. The general discussion, and this is straining my memory a lot [testimony being given approximately six

years after the conference], was to the effect that an examination had been made of the records which were available at the many branch warehouses and the central office of The Kroger Grocery & Baking Company; that audit had been conducted, as I understood, in many of the branches by Mr. Grove, in part, or under the supervision of directly Mr. Bruskotter, and supervised, at least the general impression was, by either Mr. Redman or Mr. Barthalow or under their instructions. Certain conclusions were reached as to the fact that many of the sales of The Kroger Grocery & Baking Company consisted of non-taxable items. The contention of The Kroger Grocery & Baking Company, as I recall it, was that the audit did not correctly reflect the inclusion of all those non-taxable items. As I recall the attitude of the auditors for the Tax Commission, Sales Tax Division, it seemed to be their feeling that they had included those items. Beyond that point I do not recall that there was any specific differences of opinion except that, due to the inclusion or exclusion of those items in arriving at what constituted a figure for net taxable sales upon which a tax rate were to be based, there was a difference of opinion, and there furthermore was a difference of opinion as to what the tax rate, if any, was to be. That is all. * * *

"Q. I will ask the question; what if anything was said about the so-called rate? A. The whole question of rate was very much up in the air, not only as applied to the Kroger company but as to many other companies. There seemed to be certain ambiguities which did not reconcile themselves. I believe it was the contention of the Tax Commission that the rate of tax was three per cent."

The Tax Commission's statistician testified that similar conferences had been held in the offices of the attorneys for other vendors or in other vendors' own offices.

George V. Sheridan, executive director of the Ohio Council of Retail Merchants, also attended the foregoing conference at the suggestion of a Kroger official. He stated that the meeting was called to be held at the office of the Tax Commission in Cincinnati. The room being too small, the meeting was transferred to a room at the Gibson hotel and later to the office of Mr. Marx, attorney for the Kroger company. Mr. Sheridan testified that he was interested in the principle of weighted rate, about which he had learned from the newspapers and from Kroger's full time office attorney who handled tax matters. He also testified that he was interested in some forty to fifty thousand stores which would be affected by the same principle (weighted average).

As to what transpired at the meeting in the office of Kroger's attorney, the commission's statistician testified: "The general discussion on that was the fact that the rate of tax or the method of applying the tax, the method of the tax applying, was based on a sliding scale on sales of varying amounts; a 40-cent item, taxable item being taxed at one cent would be equivalent to 2½%, and other discussions leading along that line to the fact that there was some dispute as to whether the law in any point was specific in saying that three per cent had to be collected, or whether the rate of tax was evidenced by the cancellation of stamps; a number of people talked about that; I don't recall any one in particular."

Upon further examination by relator's attorney, the Tax Commission's statistician also testified as follows:

"Q. * * * From your having examined those sworn

reports [ST 10 reports], what would you say as to whether or not the vendors in the class in which The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company were made an accounting to the Tax Commission of taxes collected on retail sales made and tax stamps cancelled for more than three cents on the dollar—* * * .

"The Witness: To make a definite statement on that requires an explanation. First, it must be assumed that the reports of all vendors are correct; many vendors, on the sales tax it is the common practice on that, as on other tax forms and forms which are required to be filled out by one governmental agency or another, to fill in the report improperly; others it is assumed fill out their reports properly; the assumption that the others fill out their reports properly leads you then to group the others together and to calculate or determine the supposed rate of tax that a whole group has made. The flaw in it might be said to be that you have no definite assurance that the amount of tax that they collected is exact in all instances nor the amount of taxable sales that they report is exact in all instances. However, if you assume that the reports are all correct, and the reports referred to were for the first period under which a report was required by regulation in the sales tax law, most of the vendors would probably run in the classification the Kroger company was in, 3%, possibly more, sometimes less, for individual vendors. The aggregate of the vendors, all those vendors, might be considerably higher; that might be due to the fact that you have reports in there that contain misstatements; it wasn't unusual at all to receive additional statements or corrected statements, sometimes, oh, a month or more late, and that

always led you to feel that, well, many of the others reports that are in here are complying with the formality rather than being exact and specific.

"Q. Well, I will put this question again and you can answer it yes or no and then explain it if you want to. Isn't it a fact that your work, that when you did your work and investigated these sworn reports ST 10, and totalled them, that it showed an average collection and accounting on the taxable retail sales of more than three cents on the dollar of vendors in the classification of Kroger and A. & P.? A. Yes, subject to the qualifications I mentioned."

The same witness testified:

"The use of the word 'study' entails a very detailed statistical technique which is carried on through determined sampling, involving all types, large and small, in their proper proportion. Such a study was not conducted. The type of classification was, shall we say, code number, which was set, grouped together heterogeneously, large and small units. A man who operated several retail routes selling grocery products might obtain—might be classified, and probably would be classified, in the same general category as The Kroger Grocery & Baking Company, or as any other large chain organization; so that the use of the word study is the use of a term which in a strict technical sense you are stretching the imagination a bit to say that those were studies; those were tabulations and tallies of reports of vendors. I draw that distinction because I am a statistician and there is that distinction."

In answer to the question: "What do you say now, taking the sales in the grocery business by and large, what do you now say that not 3.3 but 3% was exces-

sive as a proper basis for all taxable sales in the grocery line?''—the statistician answered: ''It would be my opinion that the operations at that time would aggregate three per cent of the net taxable sales.''

The ST form No. 10, Series B, required the following information concerning the operations of the vendors:

Schedule A

	Amount
1. Gross income from all sales of tangible personal property.....To..... 1935	
2. Less sales returns and allowances on which tax was refunded (from schedule C—line 16)	
3. Net sales (line 1 minus line 2)	
4. Less: Exempt sales (from schedule D —line 35)	
5. Balance (line 3 minus line 4)	
Schedule B	
6. Prepaid tax receipts on hand at close of business (date)	
7. Prepaid tax receipts purchased (between dates)	
8. Total of lines 6 and 7	
9. Less prepaid tax receipts on hand at (date)	
10. Net amount of prepaid tax receipts cancelled (between dates)	

Schedule D provided for a report of sales of exempted merchandise.

Following the conference between Mr. Greek and his associates with Mr. Marx, attorney for the Kroger company, the Tax Commission requested an opinion of the Attorney General, the summary of which opinion will be found below in the body of our opinion. In the meantime the Tax Commission adopted the following order:

"June 30, 1936

"In the matter of sales tax assessments.

"This day the commission came on to further consider the matter of making sales tax assessments under both the 1935 and 1936 laws.

"The commission being fully advised in the premises relative to the pending request to the Attorney General for an opinion involving the rights of the commission to make weighted average assessments under the laws in question, hereby orders that pending the receipt of the Attorney General's opinion, no final assessment shall be made involving the use of weighted averages, provided, however, that this entry shall continue in full force and effect until Aug. 1, 1936, at which time the matter shall be further considered, it being the intent and purpose of this order to suspend assessments of the type herein referred to until the date herein set forth.

"The vote resulted: Mr. Dargusch, aye; Mr. Davis, aye; Mr. Dunn, aye; and Mr. Kraus, aye. The order was adopted.

"George A. Edge,
"Secretary.

"Approved, Q. A. Davis,
Chairman."

After the receipt of the Attorney General's opinion the Tax Commission's journal discloses that the following order was made:

September 3, 1936.

"In the matter of assessments of vendors
for deficiencies of Sales Tax Collections
during 1935. Sales Tax Section.

"This day the Tax Commission came on to consider the matter of making assessments against vendors for deficiencies in sales tax collections for the year 1935 and, after due consideration, finds:

"That the Attorney General in Opinion No. 5890 ruled that deficiencies in sales tax collections for the year 1935 can not be ascertained by the use of an arbitrary fixed percentage figure;

"That under said Attorney General's Opinion it is necessary to have evidence which will support a percentage figure before an assessment can be based thereon;

"That in practically all cases the auditors and examiners of the Tax Commission are unable to obtain evidence which will support a percentage figure on which an assessment can be based;

"That in practically all cases, due to the fact that vendors do not have adequate records, it is impossible to ascertain the amount of deficiency in the vendors' sales tax collection without using an arbitrary percentage figure which is illegal;

"That in those few cases where a vendor's records are complete, it would be impractical to make a complete audit to arrive at the exact amount of sales tax deficiency as this would necessitate determining the exact amount due on each sale made by the vendor in the year 1935;

"That in view of the impossibility of making an audit and assessment against the vast majority of vendors for sales tax deficiencies in 1935, it would be unfair and discriminatory to assess those vendors who have attempted to comply with the sales tax law by keeping adequate records when no such audit and assessment could be made against the vendors who have not attempted to comply with the sales tax act and have kept no records.

"That in the great majority of cases audited by the department it is found that the vendor's audit is productive of small amounts of revenue whereas audits of purchasers for taxable purchases have been productive of a far greater volume of revenue than vendors audits and the department can to its financial benefit concentrate on the latter type of audit for the year 1935;

"It is, therefore, ordered that the Sales Tax Section, on and after this date, refrain from making any assessments against vendors for deficiencies in sales tax collections on sales made during the year 1935, and it shall be deemed to have been determined by this journal entry that no deficiency exists against vendors for said period.

"This entry refers to and applies only to assessments against vendors for sales tax deficiencies due on sales and does not refer nor apply to assessments against purchasers. The Sales Tax Section shall continue to assess consumers where practicable for the amount of sales tax which should have been paid on purchases.

"The vote resulted: Mr. Dargusch, aye; Mr. Dunn, aye; and Mr. Kraus, aye.

"The order was adopted.

"George A. Edge, Secretary

"Approved Carlton S. Dargusch
Vice Chairman."

Under date of February 3, 1937, the following order was entered on the Tax Commission's journal:

"In the matter of the assessment of vendors for sales tax deficiencies in the year 1935.

"The commission came on this day to consider the matter of the journal entry of September 3, 1936 entitled 'In the Matter of Assessment of vendors for Deficiencies of Sales Tax Collections During 1935' and the commission being fully advised in the premises, it is hereby ordered that said journal entry be modified so as to authorize the assessment of vendors for deficiencies in sales tax collections on sales made during the year 1935 where the vendor has maintained adequate records from which an audit and assessment can be made. In other respects the journal entry of September 3rd shall remain in full force and effect. Provided, however, that nothing herein shall authorize an assessment based upon an arbitrary percentage figure nor upon a weighted average rate.

"The vote resulted: Mr. Davis, aye; Mr. Dunn, aye; and Mr. Kraus, aye. The order was adopted.

"George A. Edge, Approved, Q. A. Davis,
"Secretary. Chairman."

Opinion.

Turner, J.

Alleging that respondent was in possession of information of specific sales of tangible personal property made by The Great Atlantic & Pacific Tea Company (hereinafter referred to as A. & P.) and The Kroger Grocery & Baking Company (hereinafter called Kroger) during the year 1935, relator sought and the Court of Appeals granted a peremptory writ of mandamus against respond-

ent as Tax Commissioner directing him to make assessments against both A. & P. and Kroger, according to formulae contained in the court's journal entry, the details of which will be discussed later.

Whether the action of the Court of Appeals should be affirmed or reversed by this court will depend upon the provisions of an act providing for the levy and collection of a tax upon the sale of tangible personal property at retail, enacted by the 90th General Assembly (115 Ohio Laws, pt. 2, 306 **et seq.**), which was effective during the year 1935, the principal provisions of which act have been outlined in the foregoing statement of facts.

At the threshold of our consideration of this case we are met with the claim by appellee that:

"On this appeal the Supreme Court is limited to a consideration of the findings of fact and conclusions of law made by the referee, as modified by the Court of Appeals in its entry, since the record does not contain a bill of exceptions, allowed and signed by the referee, as required by law."

As appellant has made no assignment of error in respect of the reference of this case, we shall pass the question with such comment only as is necessary to determine the foregoing question raised by appellee.

Assuming, without deciding, that a Court of Appeals may appoint a referee in mandamus action, we have carefully searched the record and have been unable to find where the Court of Appeals appointed a referee in this case.

The record discloses that on March 25, 1942, the Court of Appeals referred the cause to "Carrington T. Marshall, who is hereby appointed special master commissioner to take the testimony in writing in this case, report it to

the court, and therewith his conclusions on the law and facts involved in the issues." Thereafter the following journal entry appears in the record under date of May 12, 1942:

"This day this cause came on further to be heard upon the application of the special master commissioner for a clearer definition of his authority and the court being duly advised in the premises it is ordered that the said special master commissioner be invested with all the powers of a referee in chancery."

Assuming, but not deciding, that such an order may properly be made in an action in mandamus, the appointment was not thereby changed from special master commissioner to referee. While the findings of fact and conclusions of law are signed as referee, the allowance of the bill of exceptions which was ordered by the Court of Appeals was signed: "Special Master Commissioner with all the powers of a referee in chancery."

At the opening of the hearing before the special master commissioner the following took place:

"The Referee: Now that there may be no question about what I understand my duties to be, I am assigned to hear this as referee.

"Mr. Linton: Let the record show that the defendant understands that the hearing is before Mr. Marshall as special master commissioner and not as referee."

In the **per curiam** opinion of this court in the case of **Neil House Co.** v. **Shafer**, 121 Ohio St., 605, 172 N. E., 374, it was said:

"The consent to refer to a master commissioner being only a consent to a limited reference, cannot be enlarged by the court into a general reference."

In the instant case there was no consent to a reference. The reference was made upon the application of the "plaintiff" under the theory that the parties were not entitled to a trial by jury. Prior to the 1912 Amendments to the Constitution, the appeal of a mandamus case was triable **de novo** in the Circuit Court, not because it was a chancery case but for the reason that the statute authorized a **de novo** trial upon appeal in all cases where the parties were not entitled to a trial by jury. Bates Revised Statutes, 5226. Mandamus is an extraordinary **legal** remedy. 25 Ohio Jurisprudence, 973, 976, Sections 1 and 4.

In the case of **Dillon** v. **City of Cleveland**, 117 Ohio St., 258, 158 N. E., 606, the fifth paragraph of the syllabus reads:

"The Court of Appeals has both inherent and statutory authority to direct a reference **in chancery cases** pending in that court on appeal from the Court of Common Pleas and has power to direct a referee to make findings of fact and report conclusions of law."

The record in that case shows that the parties had consented to the reference. In the course of the opinion Chief Justice Marshall went into the history of reference in Ohio.

After tracing the history of references in Ohio and discussing the early confusion on the subject, it is pointed out in 35 Ohio Jurisprudence, 101, Section 3, that:

"Practically, the effect of a report of a master commissioner upon the mind of the court may not, in a majority of cases, be very different from that of the finding of a referee in a legal reference. But where

the court acts upon a master's report, it is to be regarded as declaring its own conclusions of fact and law; while in acting upon the report of a referee, at least in a legal matter, the court is to be regarded as rendering its judgment upon facts found by the referee, as it would do upon the finding of a jury. Theoretically, therefore, the responsibility of the judge is greater in the case of a master's report than in that of a referee. The master commissioner acts simply and solely for the convenience and information of the court, and his report has no force until confirmed. It differs in this respect from the decision of a referee, which, by the Code, stands as the decision of the court." (This code reference is to procedure in the Court of Common Pleas.)

In 16 Ohio Jurisprudence, 306, Section 146, the practice of reference to a master commissioner is discussed.

In 35 Ohio Jurisprudence, 120, Section 31, it is said:

"Confusion is sometimes caused in the matter of correct procedure in trials before referees largely due to the practice of treating the procedure before master commissioners and the procedure of referees as if they were identical. The two are, however, essentially different, under the provisions of the General Code; and a study of these provisions will eliminate any such confusion."

That the Court of Appeals considered that it had appointed a special master commissioner and not a referee is disclosed by the action of that court in directing its special master commissioner to sign the bill of exceptions and by the court itself duly allowing the bill of exceptions.

We find no error in the allowance of the bill of exceptions prejudicial to the rights of the appellee.

In coming to the merits of this case we shall assume, without deciding, that the case of **State, ex rel. Foster**, v. **Miller et al., Tax Commission**, 136 Ohio St., 295, 25 N. E. (2d), 686, together with further proceedings dismissed under the journal entry of November 20, 1940, furnishes no basis for the application of the doctrine of **res judicata** to all or any part of the present case. We shall also assume, without deciding, that the appellant Tax Commissioner has the right to review and redetermine the determinations of the Tax Commission of Ohio in matters which were not pending at the time such commissioner succeeded to the rights, powers and duties of the Tax Commission and in which matters no appeal was pending when the succession took place. We shall further assume, without deciding, that the Tax Commissioner is governed by no time limit applicable to the present proceeding or to assessments under the law in effect in 1935.

The sole basis for holding that the action of the Tax Commissioner was arbitrary is the master commissioner's definition of the word "arbitrary," to wit: "without legal reason;" and his holding "that a refusal on his [Tax Commissioner's] part to give notices of assessment based upon that theory of law [weighted average percentage rate], must be held to be arbitrary and an abuse of his discretion."

We have thus cleared the decks so that this matter may be disposed of finally.

It will be well to note first what procedure both the Tax Commission and the Tax Commissioner were bound to follow in the premises.

Section 5623, General Code, provides (and so provided at all times here in question):

"The Tax Commission of Ohio shall decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the Attorney General. Such opinion and the rules, regulations, orders, and instructions of the commission prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless and until the same are reversed, annulled or modified by a court of competent jurisdiction."

On July 24, 1936, the Attorney General, in response to a request therefor from the Tax Commission of Ohio rendered an opinion addressed to that commission, the syllabus of which reads (Opinions of the Attorney General, 1936, Vol. II, page 1134):

"The Tax Commission of Ohio, in determining the question whether a delinquent sales tax assessment should be made against a particular vendor under the provisions of Section 5546-9a, General Code, and, if so, the amount of such assessment, is required to determine such questions upon such information as it may have or which may come into its possession upon its investigation of the business done and sales made by the particular vendor and of the sales taxes collected and sales tax receipts cancelled by him during the period of time under investigation. The Tax Commission is not authorized under this section of the General Code, or otherwise, to determine the question of such de-

linquency or to make an assessment against such vendor based on an application to the amount of the gross sales receipts of the vendor during such period of time of a weighted average percentage rate determined by the Tax Commission indicating the average amounts of sales taxes properly collectible by vendors generally in that particular line of trade or business as compared with gross sales receipts by vendors generally in such line of trade or business during the period of time under investigation.

"The Tax Commission of Ohio is not authorized under this section of the General Code to make a delinquency sales tax assessment against a vendor for the particular period of time under investigation based solely upon information and evidence obtained by the Tax Commission by means of a subsequent 'spot-check' of the vendor's business and sales made by the Tax Commission. Although the information and evidence obtained by the Tax Commission by means of such 'spot-check' may be both competent and relevant if the conditions obtaining with respect to the business done and sales made by the vendor during the period of such 'spot-check' are comparable in amount, kind and character with the business done and sales made by the vendor during the period of time under investigation, the information and evidence thus obtained should be used with 'any (other) information within its possession or that shall come into its possession,' in determining the question whether any delinquency sales tax assessment should be made against the vendor, and, if so, the amount of such assessment.

"The Attorney General will not assume the prerogative of expressing any opinion as to the constitutionality

of the provisions of Section 5546-12a, General Code, as the same were enacted in and as a part of House Bill No. 572 by the 91st General Assembly." (A supplement to this opinion was later issued but therein consideration was given to the law in effect in 1936. Section 5546-12a, General Code, was not in effect during 1935.)

After making request for the opinion the Tax Commission made the order of June 30, 1936, shown in the foregoing statement. After receipt of the Attorney General's opinion the commission made the orders of September 3, 1936, and February 3, 1937, also set out in the above statement.

Under Section 1464 **et seq.**, General Code, the Department of Taxation, consisting of the Tax Commissioner and the Board of Tax Appeals, succeeded to the functions, powers and duties which were by law devolved upon, vested in and imposed upon the Tax Commission of Ohio.

Therefore, until such opinion of the Attorney General has been reversed, annulled or modified by a court of competent jurisdiction, there was and is no duty resting upon the Tax Commission or its successor, the Tax Commissioner, to take the action sought to be enforced herein by mandamus.

We consider the present action a proper test of the correctness of the foregoing opinion of the Attorney General.

Opposed to the foregoing opinion and advice of the Attorney General is the order of the Court of Appeals in the instant case and particularly that part which we have emphasized as follows:

"It is, therefore, further ordered, adjudged and decreed, that a writ of mandamus issue as prayed for in relator-plaintiff's second amended petition, directing the defendant, William S. Evatt, Tax Commissioner of Ohio, to make an assessment against the vendors, The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, as a result of retail sales made by each of said vendors for the year 1935 in the state of Ohio, based upon the following information now in the hands of said defendant, William S. Evatt, Tax Commissioner, to wit:

"1. ST 10 Report of each of said vendors for 1935 in evidence in this case; 2. The report of the auditors of the Tax Commission made from the books and records of each vendor for the year 1935, in evidence in this case; 3. **the average percentage of tax collectible from taxable retail sales, in the business in which two specific vendors herein described are engaged; 4. the mathematical probabilities demonstrated by the bracket tax rates set out in G. C. 5546-2, that the tax collectible on taxable retail sales made by the vendors could not be less than 3%.**

"And computed upon the basis of three (3) per cent of the sales shown to be taxable, and, thereafter give notice thereof, to said vendors, and take each and all further, necessary and additional administrative and legal steps to collect final deficiency assessments against said vendors under the sales tax act as found in House Bill No. 135, G. C. 5546-1 **et seq.**;—all in accordance with the finding and report of the referee, as herein confirmed. * * *"

In the case of **State, ex rel. Foster**, v. **Miller et al., Tax Commission, supra**, wherein the same relator was

seeking a writ of mandamus to the effect, **inter alia**, that the Tax Commission and its members should be required to discharge the specific mandatory duties imposed by law and the Sales Tax Act, it was held:

"* * * in the absence of allegation and proof that an officer or commission charged with the duty of collecting sales taxes has refused arbitrarily to collect the amount due on a specific taxable sale or sales, the writ of mandamus will not lie * * *."

It would seem that the foregoing statement of law should apply here. This statement of the law was apparently accepted by the Court of Appeals as correct in passing upon a relator's first and second amended petitions herein. In referring to the first amended petition the Court of Appeals said: "The amended petition is too general and lacks allegations of specific acts required under the law". In its decision upon the second amended petition the Court of Appeals said: "The amended petition alleges that the commission has refused arbitrarily to collect the amount due on the sales made by these corporations. Whether the petitioner can come within the third syllabus of **State, ex rel.**, v. **Miller** as to the necessary proof that the commissioner has refused arbitrarily to collect the amount due on **a specific taxable sale or sales**, remains to be determined after the evidence has been disclosed." The words "a specific taxable sale or sales" were underscored in the original decision of the Court of Appeals.

Had the Court of Appeals adhered to its view of the law as apparently expressed in the foregoing decision, the judgment of that court necessarily would have been for appellant here and no peremptory writ of mandamus

would have been allowed for the simple reason that the special master commissioner did not find and the record did not disclose a single specific taxable sale or sales upon which the Tax Commissioner had refused arbitrarily or otherwise to collect the amount due. In passing upon the second amended petition, upon which this case was heard, the Court of Appeals was apparently accepting the third paragraph of the syllabus of **State, ex rel. Foster**, v. **Miller et al., Tax Comm.**, 136 Ohio St., 295, at face value.

However, in its final opinion in this case the Court of Appeals said in respect of that case: "As to the third syllabus there arises the question if it was responsive to any proposition of law presented to the court by the pleadings and the facts, but after having given the matter close scrutiny we are of the opinion that in using the term 'specific taxable sale or sales,' the court did not intend to say that it was necessary to prove 'individual' sales. There is a distinction in the two terms which should be applied in the determination of this particular issue."

As to the first part of the foregoing quotation we have already pointed out that this same relator had sought a writ of mandamus against the members of the Tax Commission to compel them to discharge their duties under the same sales tax law with respect to the same sales made by A. & P. and Kroger for the years 1935 and 1936.

As to the latter part of the foregoing quotation, we simply call attention to the fact that that paragraph dealt with **a** specific taxable sale or sales. We are of the opinion that the language used in the third para-

graph of the syllabus referred to means the same as if instead of the word "specific" the word "individual" had been used.

The report of the special master commissioner, which was confirmed by the Court of Appeals, was based upon the following premise of the master:

"The opinion of the Tax Commissioner, as expressed in his testimony in the hearing on this case, that he had no power and that the Tax Commission in 1936 had no power to apply the weighted percentage rate upon an accurate audit is so clearly unsound, that a refusal on his part to give notices of assessment based upon that theory of law, must be held to be arbitrary and an abuse of his discretion."

The special master commissioner reached his conclusion as to the authority of the commission and commissioner to adopt or use a "weighted average percentage" by the application of the doctrine of implied powers announced in the case of **McCullouch v. Maryland**, 17 U. S. (4 Wheat.), 316, 4 L. Ed., 579.

There is no analogy between the powers of the Congress, or any other legislative body, to enact laws and those of an administrative commission which possesses no law-making power. The Federal Constitution contains a delegation of powers to legislate while the Sales Tax Act in question contains a delegation of authority to administer what has been enacted by the General Assembly. Under its rule-making powers (Section 5) the commission had the power to adopt and promulgate such rules and regulations as it might deem necessary to **carry out the provisions** of the act. It should need no citation of authority, in this state at least, to demon-

strate that boards and commissions have no lawmaking power and that under our Constitution no such powers may be delegated.

The special master commissioner and the Court of Appeals, in confirming his report, have held in substance that where the General Assembly has omitted a provision to successfully carry out what the courts may think to be the spirit of the law the administrative body may and should supply that deficiency. We do not subscribe to such view. See **Davis et al., Comm.**, v. **State, ex rel. Kennedy, Dir.**, 127 Ohio St., 261, 187 N. E., 867; **Matz, Admr.**, v. **J. L. Curtis Cartage Co.**, 132 Ohio St., 271, 7 N. E. (2d), 220.

As was said by Chief Justice Marshall in the case of **Cassidy** v. **Ellerhorst**, 110 Ohio St., 535, 539, 144 N. E., 252, 42 A. L. R., 372:

"In approaching the interpretation of statutes imposing taxes, it should be recognized at the outset that the rule of strict construction should be followed, and that, where there is ambiguity or doubt as to legislative intent, the doubt should be resolved in favor of the person upon whom the burden of taxation is sought to be imposed, and that language employed in a taxation statute should not be extended by implication beyond its clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule has been declared by this court in **Gray** v. **City of Toledo**, 80 Ohio St., 445, 448, 89 N. E., 12, and **City of Cincinnati** v. **Connor**, 55 Ohio St., 82, 91, 44 N. E., 582; and by the Supreme Court of the United States in **Gould** v. **Gould**, 245 U. S., 151, 38 S. Ct., 53, 62 L. Ed., 211."

Relator puts much emphasis on the fact that a personal liability is provided under Section 9a of the act for retail sales **admittedly** made by a vendor. The record does not disclose the making of any taxable retail sale and certainly none was admitted. The label "personal liability" is merely a polite term for "penalty." Statutes imposing penalties are to be strictly construed. 19 Ohio Jurisprudence, 216, Section 19. Besides, before a liability for the penalty may be established, proof of a taxable sale or sales must be adduced. This is clear from the opening sentence of Section 9a, which reads: "In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel."

Administrative rules may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the legislative enactment. It was within the power of the Tax Commission to have prescribed the procedure or method whereby vendors were to make records of or keep track of all sales classified as to the respective tax brackets. This the commission did not do for the reason that such records were impracticable. The commission did prescribe forms of audits and provided for assessments against the vendor according to weighted average rates. So far as the auditing was concerned that was clearly within the powers of the commission but we find no justification in the law for making assessments against vendors according

to a flat rate, a weighted average percentage or any mathematical probabilities.

As stated in 37 Ohio Jurisprudence, 378, Section 106:

"The term 'amendment' implies such addition to or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed." See, also, 50 American Jurisprudence, 16.

We are not here concerned with later amendments, save as they tend to show omissions in or a change from the original act. On December 13, 1935, the 91st General Assembly amended the original Sales Tax Act by the adoption, **inter alia**, of Section 5546-12a, General Code (116 Ohio Laws, pt. 2, 77), which provided as follows:

"When an examination and audit of the vendor's books and records, by the commission and its agents, discloses no separate records of the tax collected from the consumers and the amount of such collections, or that the aggregate collection from consumers is less than three per centum of the vendor's sales, it shall be conclusively presumed that the vendor has failed to collect the tax from the consumer and in such cases the commission shall make a finding and assessment of the amount of tax, plus a penalty of fifteen per centum of the amount thereof, which the vendor should have collected and proceed forthwith to collect the same. Failure of the vendor to pay such assessment and penalty within ten days after the certification thereof shall result in the automatic revocation of the vendor's license and such revocation shall prohibit the vendor from engaging in the business of selling tangible personal property in this state. * * *"

The foregoing enactment was later amended (December 22, 1936, 116 Ohio Laws, pt. 2, 333) and thereafter Section 5546-12a, General Code, provided:

"In addition to the tax levied in Section 5546-2 of the General Code * * there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per centum of the receipts derived from all such retail sales, excepting those to which the excise tax imposed by Section 5546-2 of the General Code is made inapplicable by subparagraphs 1 to 12, inclusive, of said section. The tax imposed by this section shall be determined by deducting from the sum representing three per centum of the receipts from such retail sales the amount of tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of Section 5546-3 of the General Code. This section shall not be so construed or applied as to affect any duty of the vendor under Sections 5546-1 to 5546-17, both inclusive, of the General Code, nor the liability of any consumer to pay any tax imposed by Section 5546-2 of the General Code."

Section 5546-12a, General Code, as last above quoted, became effective January 1, 1937. Had it been in effect during the year 1935 it would have required a different conclusion than is necessary here. Our question here pertains only to sales made during the year 1935.

It is reasonable to assume that Section 5546-12a, General Code, was adopted and amended in an attempt to take care of just such situations as were disclosed by the Tax Commission's audits.

Where statutes are ambiguous there is room for judicial interpretation but where instead of an ambiguity there is an absence of enactment, courts are without

power to supply the deficiency. It has been held, too often to need any citation of authority, that in seeking legislative intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.

In the case of **State, ex rel. Methodist Children's Home Association,** v. **Board of Education of Worthington Village School Dist.,** 105 Ohio St., 438, 138 N. E., 865, at page 449 Judge Matthias said: "No decisions are more harmful in their ultimate effects than those wherein the courts attempt, by statutory interpretation, or rather by statutory construction, to provide for a particular situation in a manner believed to be popularly desired, and such unwarranted usurpation of the legislative power merits the condemnation usually accorded it after full and candid consideration and upon deliberate and mature judgment."

We also agree with the statement of Chief Justice Marshall in his dissenting opinion in that case at page 465 wherein he said: "The key to judicial interpretation is the legislative intent * * *."

Where the General Assembly has omitted a provision in an act necessary to make it complete or otherwise advisable, the courts have no power to supply what the court thinks the legislature ought to have enacted.

In the case of **Slingluff** v. **Weaver,** 66 Ohio St., 621, 64 N. E., 574, this court held:

"* * * The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

See, also, 37 Ohio Jurisprudence, 488, 490 and 514 and **Sears** v. **Weimer**, 143 Ohio St., 312.

As stated in 37 Ohio Jurisprudence, 492, Section 269:

"It is not the function of a court to set forth what it thinks the statute under consideration should provide or to give to a statute an operation which the legislature does not intend. The statute may not, under the guise of interpretation, be modified, altered, amended, set aside, disregarded, crippled, nullified, or repealed. There is no authority, under any rule of statutory construction, to add to, enlarge, supply, expand, extend, or improve the provisions of the statute to meet a situation not provided for, or contemplated, thereby, or to substitute other provisions therefore. * * * Nothing may be read into, or out of, the statute which is not within the manifest intention of the legislature as gathered from the act itself."

It must be kept in mind that neither the A. & P. nor Kroger was authorized to proceed under Section 5 of the act whereby the Tax Commission had the authority to authorize a vendor to prepay the tax levied and waive the collection of the tax from the consumer in the manner otherwise provided in the act. What we are dealing with here is the liability of a vendor for the collection of a tax levied against the consumer with a presumption that all sales by the vendor are subject to the bracket tax levied until the contrary is established. The same section in which this provision for presumption is contained (Section 2) is the tax levying section and contains twelve categories of exempt sales. Under the law none of these exempt sales could be presumed to be subject to the tax levied for in specific language the section provides: "The tax hereby levied does not apply to the following sales."

Therefore, there is no basis for making an assessment based upon gross or net receipts against either A. & P. or Kroger **under the law in effect in 1935.**

It was in an effort to correct this apparent loophole in the law that the succeeding General Assembly enacted Section 12a, **supra** which at first provided that when an examination and audit of the vendor's books and records by the commission and its agents disclosed no separate records of the tax collected from consumers and the aggregate collection from consumers was less than three per cent of vendor's sales it should be conclusively presumed that the vendor had failed to collect the tax from the consumer and in such case the commission was authorized to make a finding and assessment directly against the vendor.

It is true that in the ST 10 reports there are reports of exempt sales which are summarized in the recapitulation of the auditor's sheets. The evidence disclosed that the Kroger attorney disputed the amount of exempt sales as determined by the audit.

While the discrepancy between the net sales (gross sales less allowed exempt sales) and the amounts of prepaid tax receipts cancelled may be striking, yet there is nothing in this record which discloses in which brackets or below any bracket (**i. e.**, below nine cents) the sales, if taxable fell. In order that the taxing officials might have had any ground upon which to proceed, it would have been necessary to classify the vendor's sales according to the different brackets and exemptions. Here then would be some basis upon which the presumption of taxability might apply. The record here shows and the special master commissioner found that the A. & P. cancelled stamps in approximately 2.47 per cent of claimed

taxable sales while Kroger cancelled approximately 2.50 per cent of claimed taxable sales. There is no evidence in the record showing whether there were any other vendors whose sales were comparable. There is no evidence comparing A. & P. stores with Kroger stores in the same localities. The record contains no evidence that either A. & P. or Kroger failed to comply with Section 3 of the act.

The record in this case is to be tested by the provisions of Section 9a of the Sales Tax Act in effect in 1935. This section is set out in full in the foregoing statement of facts. The part here material is as follows:

"In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.

"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. * * *"

As there is no evidence that either the A. & P. or Kroger collected any tax for which either failed to cancel the prepaid tax receipts in the manner prescribed by the act and the regulations of the commission, we are confronted with the question of whether there is any information within the possession of the Tax Commissioner showing that either of the vendors failed to collect the tax imposed by Section 2 of the act. The ST 10 forms as well as the audits made by the Tax Commission disclose gross sales less returns and the balance of net

sales. They also disclose the net amount of prepaid tax receipts cancelled. Our question is, does this information disclose any sales of nine cents but of not more than forty cents on which one cent tax should have been collected; or does it disclose any sales of more than forty cents and not more than seventy cents on which two cents tax should have been collected; or does it disclose any sales of more than seventy cents but not more than one dollar on which three cents tax should have been collected; or does it disclose any sales in excess of one dollar upon which the prescribed tax was not collected.

The court below has held that the liability of vendors under Section 9a of the act may be proved by the application to the net sales, as determined by the commission's audits, of the average percentage of tax collectible from taxable retail sales in the business in which the two specific vendors are engaged, and/or by the mathematical probabilities demonstrated by the bracket taxes set out in Section 5546-2, General Code, that the tax collectible on the taxable retail sales made by the vendors could not be less than three per cent. The so-called average percentage of tax collectible referred to by the court below is based upon unverified data which the evidence clearly shows to be unreliable. There is no evidence that any spot-checks were made in any of the stores of either A. & P. or Kroger. The testimony showed that while the records of these concerns were very complete and adequate to cover the matters required by the regulations of the Tax Commission under Section 12 of the act, like other grocery stores such records were not broken down as to individual sales so that the tax due upon the respective specific sales could be shown. It was shown by the witnesses who testified on the subject

that it was not practical for such concerns as A. & P. and Kroger to keep a record of each taxable retail sale. Whatever may be said about the possibility or practicability of such merchants making and keeping records of each small sale or the possibility or practicability of auditing such records, the matter must be dismissed for the reason recognized but not followed by the special master commissioner and the court below, **i. e.**, neither the law nor the regulations of the commission required the keeping of such records.

We have read every word of the record and have been unable to find evidence of a single taxable sale having been made by either A. & P. or Kroger in which the proper amount of sales tax receipts were not cancelled. In appellee's brief it is said: "We freely concede that no evidence was offered of any individual sale or sales."

As there is no evidence of any information in the hands of appellant or his predecessor outside of the ST 10 reports and the audits showing total sales, our question is narrowed to whether under the Sales Tax Law in effect in 1935 (115 Ohio Laws, pt. 2, 306 **et seq.**), the Tax Commissioner may be compelled by mandamus to base an assessment against either or both A. & P. or Kroger upon "the average percentage of tax collectible from taxable retail sales, in the business in which two specific vendors herein described are engaged," or "the mathematical probabilities demonstrated by the bracket tax rates set out in G. C. 5546-2, that the tax collectible on taxable retail sales made by the vendors could not be less than 3%." To each of the alternatives in the foregoing question, the answer is clearly no.

We are of the opinion that the record discloses no information in the possession of the Tax Commissioner

upon which an assessment may be made against either A. & P. or Kroger. The special master commissioners's finding of law No. 4 should not have been confirmed even as modified. Therefore, the judgment of the Court of Appeals should be and hereby is reversed and the cause dismissed at relator's costs.

Judgment reversed.

Weygandt, C. J., Matthias and Bell, JJ., concur.

Zimmerman and Williams, JJ., dissent.

Hart, J., not participating.

Zimmerman and Williams, JJ., dissenting. The divergence of opinion between the majority and minority can be made plain in a few words.

The principal divergence is based upon the necessity or lack of necessity for information as to specific sales. The majority takes the view that the presumption as to taxability provided for in Section 5546-2, General Code, applies only when the Tax Commissioner has information as to such specific sales. The minority is of the opinion that the presumption applies to all sales regardless of the specific amount of any sale or sales and therefore to the total amount of all sales. The part of Section 5546-2 covering presumption read thus:

"For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

The Tax Commissioner was not required to act upon the presumption alone but had before him uncontradicted

evidence which showed that The Kroger Grocery & Baking Company and the Great Atlantic & Pacific Tea Company, operating chain store businesses in Ohio in the year 1935, had failed to pay tax upon retail sales in the sum of approximately three quarters of a million dollars. Under Section 5546-9a, General Code, the Tax Commission had power to make an assessment against such companies "based upon any information within its possession or that shall come into its possession." The Tax Commissioner as successor to the Tax Commission has like power.

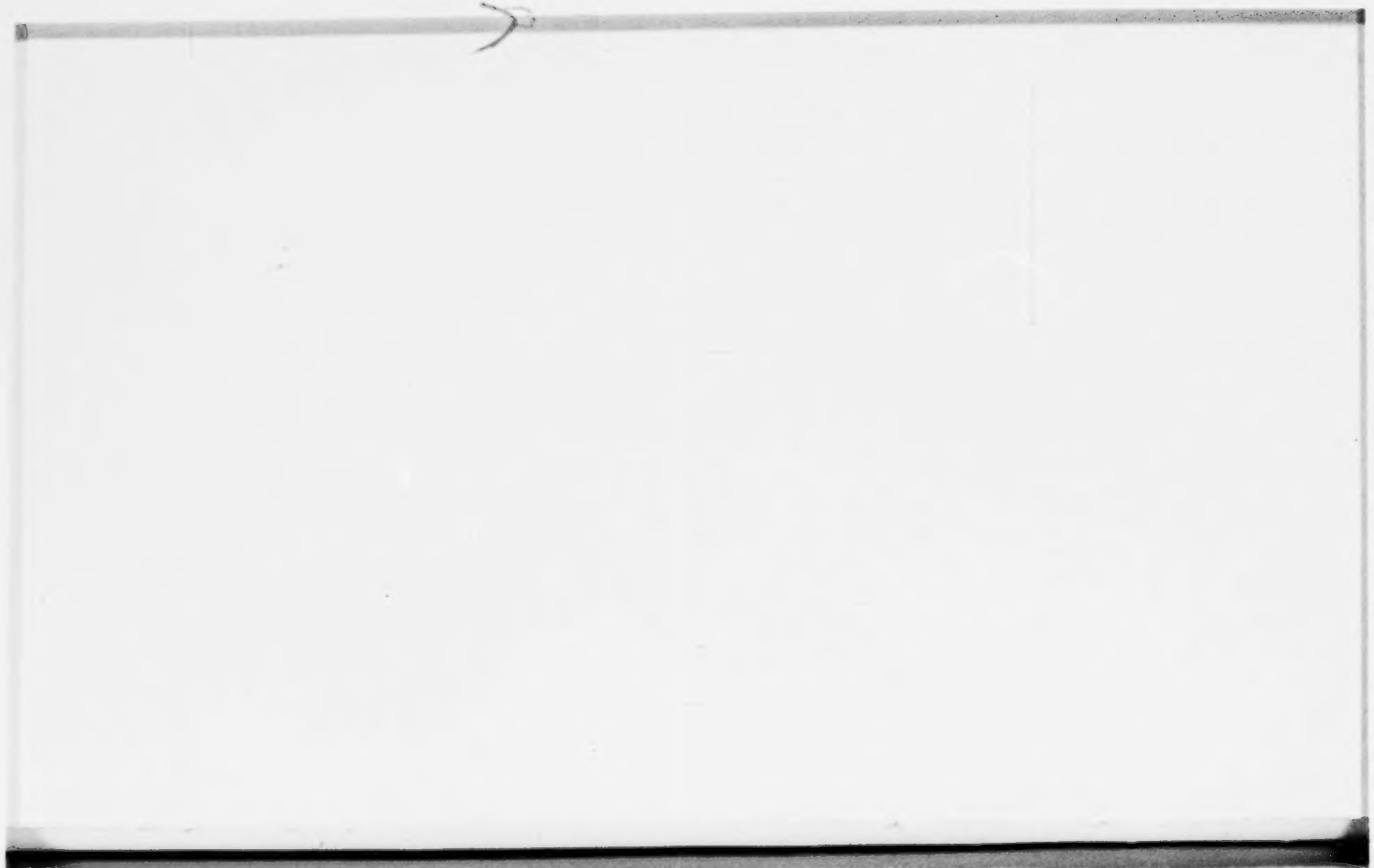
As applied to the specific facts in the case at bar, it is the opinion of the minority that when the Tax Commissioner was confronted with uncontradicted proof that the taxpayers involved here had not paid their sales tax, it was the duty of such commissioner, acting **ex parte**, to make an assessment in accordance with evidence before him and notify the taxpayers. There is no question that the taxpayers could then appeal. Section 5611, General Code, also gives to the state or a county the right of appeal from a decision of the Tax Commissioner favorable to the taxpayer. Such appeal may be taken "by the Director of Finance of the state of Ohio if the revenues affected by such decision would accrue primarily to the state treasury; or by the county auditors of such counties, if any, to the undivided general tax refunds of which the revenues affected by such decision would primarily accrue." Due to the fact that the Tax Commissioner refused to make the **ex parte** assessment no hearing has ever been had.

The minority is in accord with the majority that under Section 5623, General Code, the wrong or erroneous advice of the Attorney General is not a defense to a man-

damus proceeding brought to compel the tax commissioner to perform a duty which the law "specially enjoins" upon him in his official capacity.

Any other divergence of opinion between the majority and the minority is minor and not of controlling importance.

In our opinion the judgment of the Court of Appeals should be affirmed.



In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 1036.

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
A Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

REPLY BRIEF OF PETITIONER.

MATTHEW L. BIGGER,
50 East Broad Street,
Columbus, Ohio,
Attorney for Petitioner.

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REPLY BRIEF OF PETITIONER.

We will endeavor to be brief in submitting this reply brief.

We will take up the respondent's brief and discuss the several subjects in the same order that respondent has discussed them.

1. "THE PARTIES IN THE CASE BELOW WAIVED ANY CLAIM OF DISQUALIFICATION OF JUDGE TURNER AT THE TIME OF HEARING."

The first case cited is that of *Tari vs. State*, 117 O. S. 48. By referring to that portion of the opinion of Chief Justice Marshall at page 496 of the opinion found on page 8 of their brief, it will be observed that the legal proposition stated was qualified by the words "and not affecting public policy." It was emphasized in that case that the disqualification was personal to complaining party.

In the *Tari* case the judgment affected only an individual who was charged with a misdemeanor and it did not in any sense affect public policy.

(The emphasis throughout is ours.)

At page 9 of respondent's brief they have quoted from 30 *Am. Jur.* 800, "Judges" Section 95. *That section is limited to disqualification relating to personal privilege and where they are subject to waiver.* In Section 95 there is a reference to a footnote which points to Section 94, which Section 94 relates to matters of public policy. We quote from Section 94 as follows:

> "In the absence of a controlling statute on the subject, this is generally held to be true in respect to any disqualification which is regarded as a matter of personal privilege and is not based on public policy. * * * On this theory some courts held that an objection that a judge is disqualified because of some interest or a bias or prejudice may be waived or that one may by his conduct estop himself from interposing an objection, but where the disqualification is deemed to be based on reasons of public policy, it cannot be waived and for this reason it has been held that disqualification on the ground of relationship or interest cannot be waived."

We have examined the other citations at page 9 of their brief but inasmuch as counsel has not quoted from them or pointed out any particular pertinency, and we do not find any particular pertinency, we do not feel called upon to further discuss them.

It has been held by all authorities on the question that where an interest in the conclusions to be reached, or the result obtained is pecuniary—that the interest thus arising creates a disqualification—based on the maxim that a judge cannot sit in his own cause; that such disqualification is founded upon public policy; that where the disqualification is founded upon public policy or exists because the action is prohibited by constitution, or statute, it cannot be waived; and if founded on public policy, it cannot be waived because expressly prohibited, that then the judgment is void.

Referring to the comments of opposing counsel at pages 9 and 10, it is conceded that the occurrences at the

hearing in the Supreme Court were in part as outlined by opposing counsel, but it is only fair to say that counsel signing this brief was at all times the principal counsel in the case and had no knowledge of the colloquy between the court and counsel until after that date. It is not conceded that Mr. I. B. Hart, who was assistant counsel, expressly waived his objection at the time of the hearing. It is not even claimed that the inquiry was made of the *relator* as to whether or not he was willing for Judge Turner to participate, but even if inquiry had been made of relator, he would have had no power to waive the rights of the State of Ohio, millions of taxpayers in Ohio who were paying sales taxes. The sales tax reached every man, woman and child in the State of Ohio and their rights could not be so easily transgressed, neither could the relator have waived them.

This Court will no doubt wonder why Mr. I. B. Hart does not join in this appeal. It is therefore pertinent to explain that Mr. Hart is a son of Judge William L. Hart of the Ohio Supreme Court and obviously it would have been embarrassing to him to participate in this appeal, and inasmuch as there was no real necessity for his further participation, he elected to withdraw. Concerning Mr. Hart, we refer the Court to the affidavit found at page 945 of the record.

2. WAS THE INTEREST OF JUDGE TURNER SUCH AS TO DISQUALIFY HIM?

In our original Petition and Brief at pages 27, 28, and 41 to 50 inclusive, we cited, quoted and discussed a large number of cases which were certainly exactly in point and the principles declared in those cases are certainly decisive of the question of Judge Turner's disqualification. It is noteworthy that opposing counsel has not attempted to distinguish those cases and has not attempted to show their inapplicability. On the contrary at page 11 of the

respondent's brief, we find six cases cited on the theory of Judge Turner's disqualification. We have examined every one of those cases, and we are prepared to show that they are not applicable to the facts of this present appeal.

The case of *Love vs. Wilcox,* 119 Tex. 256, decided that the interest must be direct and immediate, not remote or contingent, and that the interest must "occur on the result of the suit." Judge Turner's interest did arise as a result of the suit, and it is conceded that his rental was increased by his getting a percentage of the taxes which were illegally retained by the Kroger Company.

The case of *Sioux City vs. Western Asphalt Paving Corp.,* 223 Iowa 279, decides that the interest must be "some direct pecuniary gain or property, and has no reference to the remote interest which he along with every other citizen or taxpayer of a city might have in the result of a judgment against the city."

The case of *State ex rel. Seiders vs. Bangor,* 98 Me. 114 was parallel on its facts to the *Sioux City* case and involved the interest of a taxpayer.

The case of *Foreman vs. Mariana,* 43 Ark. 324, involved the interest which every citizen must feel in public proceedings or public measures and did not involve any pecuniary or property interests. The result of the suit in that case would not have affected the judge differently from its effect upon every other citizen.

In the case of *Ex parte Harris,* 26 Fla. 77, the judge was a brother-in-law of one of the parties and the holding in that case was that a feeling of sympathy would not disqualify a judge even though it might be such as would disqualify a juror.

The case of *Metsker vs. Whitsell,* 181 Ind. 126, more properly belongs to the third subject of discussion in respondent's brief, but it is sufficient to say that that case does hold that "the direct, pecuniary interest of a judge in the result of the litigation furnishes a sufficient ground

for his recusation regardless whether such interest is great or small."

That case further holds that the judge should not be held to be disqualified if he is the only tribunal for hearing the matter in issue. We shall discuss this latter proposition later in this brief.

Opposing counsel attempt to show that Judge Turner was not financially benefited. It is stated that in addition to the "flat" rental, that Judge Turner received a percentage of the gross sales of the Kroger Company. It is incorrect to call it a "flat" rental. Judge Turner's affidavit states "The 1935 lease rental was based upon a percentage of sales." (Rec. p. 921.)

Opposing counsel overlook the fact which is clearly shown by the record that the Kroger Company kept no separate account of the monies collected from customers on account of sales tax but that the same were mingled with the receipts from sales. Judge Turner therefore received 5 per cent of whatever was withheld by the Kroger Company in its accounting with the State of Ohio. This is undenied and undeniable. Opposing counsel overlook the further fact that whatever settlement may have been made between Judge Turner and the Kroger Company for the year 1935, it must be very clear that in the absence of a showing that the Kroger Company had made an honest accounting in the years subsequent to 1935 that Judge Turner has benefited in each of those subsequent years, and it is also painfully apparent that Judge Turner's decision will leave the state without remedy to inquire into those subsequent years.

This is a complete answer to the highly technical arguments made by opposing counsel in summarizing the arguments at page 6 and again in elaborating their arguments at page 12.

Even for the year 1935 the settlement referred to does not change the situation in the slightest. The statement concerning that settlement would at most only show that

Judge Turner received improvements to his property instead of actual cash.

3. DID JUDGE TURNER OWE A DUTY TO PARTICIPATE IN THE DECISION IN THE INSTANT CASE?

Opposing counsel claim that he did owe such a duty and in support of that claim cite *United States vs. Pendergast*, 34 Fed. Sup. 269. In the famous Pendergast trial, Pendergast alleged disqualification merely because he preferred some other judge. Surely everyone would concede that Judge Otis owed no duty to step aside on that ground only. The Court said a Judge should not step aside merely because some one wants him to. There was no pecuniary interest alleged or involved.

The case of *State ex rel. Mitchell vs. Sage Stores*, 157 Kans. 622, is equally foreign to our present controversy. It appears from the quotation at page 13 of their brief that there was no disqualification, merely a preference not to participate. We submit that neither of the foregoing cases should have any effect upon this appeal.

Referring to the comments of opposing counsel at page 14, it is certainly out of place to refer to the situation of Judge Zimmerman. It is claimed that Judge Zimmerman's father was the owner of a property rented for commercial purpose, and that the same disqualification would apply to him as applies to Judge Turner. We know nothing about the circumstances of that particular tenancy except as has been stated by opposing counsel. It does not appear that Judge Zimmerman himself had any interest whatever in the property. Neither does it appear that it was of such a character that the tenant could escape the collection and payment of lawful sales taxes. There certainly is no claim that the tenant is charged with such illegal retention of taxes. We think the discussion of Judge Zimmerman is entirely out of place in this litigation.

Counsel further stated:

"It could well be probable that some of the other members of the court were lessors of real property to lessees who were vendors of personal property at retail * * *"

Based upon this violent assumption, counsel state that such "lessees necessarily would have been affected by the decision of the case below if they were in business during the year 1935." This assumes that all of the retail merchants in Ohio were guilty of fraud in the collection and return of sales taxes. We think it is clear from the printed record in this case that it was not possible to defraud the State of Ohio except by the expedient of refusing to keep records of sales, and it is not claimed that there was such fraudulent conduct on the part of anyone except certain classes of chain stores and department stores.

It must be borne in mind that the Supreme Court of Ohio was considering an appeal from a trial court. Neither the Constitution of the United States nor the Constitution of the State of Ohio guarantee a review of the decision of the trial court. It is only guaranteed to litigants that their controversies may be submitted to a court of justice. There was a full trial and as we think a fair trial by the Court of Appeals in Ohio, and there was a decision and as we think a correct decision of that controversy by that trial court. Even if there was any foundation for the claim that Judge Turner's retirement would have prevented a review, it would be no ground for submitting to a decision at the hands of a disqualified court arising out of a pecuniary interest opposed by public policy.

It is at best a labored and strained argument that opposing counsel make as to the necessity of Judge Turner's presence in order to render a decision.

What the respondent really means is that his presence was necessary to a decision favorable to the Tax Commissioner. It is true that the Constitution of Ohio provides that a majority of the court, namely four members, are necessary to pronounce a decision. Manifestly it does not

follow from that provision that the disqualified judges are required to sit in order to make up a quorum.

It has many times happened in Ohio that a single member of the court has believed himself to be disqualified and did not participate, and that the remaining six members were equally divided, thereby resulting in a failure to render any judgment.

After Judge Hart frankly recognized his disqualification, there still remained six judges. Surely it could not be known at that time how the judges would vote and there would still remain five judges to consider and act upon the case if Judge Turner had retired.

The Tax Commission had a right under the constitution, subject to the limitation pointed out on page 13, our petition, after the adverse judgment of the Court of Appeals, to perfect an appeal from the Court of Appeals to the Supreme Court, but neither the Constitution of Ohio nor the Federal Constitution contains any guaranty that the Supreme Court of Ohio will render a judgment either of affirmance or of reversal. As a matter of fact, the Constitution of Ohio makes provision for a tie vote in which event the failure to reach a judgment, either of affirmance or reversal, will be considered as an affirmance.

There have been many cases submitted to the Supreme Court of Ohio since the constitutional amendments of 1913 wherein the Supreme Court has failed to render final judgment for that reason, and surely this case should not be made an exception to a well settled rule.

We repeat that what the respondent really desires is to have Judge Turner participate in the case because with his participation they have one more favorable vote which assures to them a favorable judgment.

Surely there is nothing about the facts of this case which puts it in a class by itself and makes it important to defeat the ends of justice by preventing sales tax collectors being required to pay into the state treasury taxes collected from their customers, the consuming public.

4. WAS THERE ERROR IN THE DECISION OF THE COURT BELOW?

The first proposition advanced by opposing counsel on this point is that the writ of mandamus cannot be invoked to control official discretion. No authority need be cited on this point, and we will freely concede that bald proposition. Our contention is that it has no application to this case.

The duty devolves upon the Tax Commissioner to "enforce and administer the provisions of this act." (Sec. 5546-5 G. C.) Manifestly it follows that it is his plain duty to prevent evasion of the law and to protect the public revenue.

Section 5546-9a declares the personal liability of any vendor who fails to collect the sales tax or to faithfully account for taxes collected by him. That section further makes it the duty of the Tax Commissioner "to make an assessment against such vendor based upon any information within its possession or that shall come into its possession." The question arises therefore whether there was any information in the possession of the Commissioner which called upon him to act. The Court of Appeals has found that the reports of these vendors, supplemented by the voluminous audit made by accountants employed by the Commission, showed an evasion and further showed the amount of the evasion. It was upon this finding of fact that there was information in the possession of the Tax Commissioner which required him to further proceed, that the Court of Appeals issued the order of mandamus to perform a specific duty and to compel him to levy a tentative assessment, thereby placing upon these two vendors the burden of proof to show that they had properly accounted. These two vendors then had the opportunity to petition for a reassessment and to make a full inquiry as to their accounting and later if desired by them to appeal to the courts. All of these rights were guaranteed to vendors by the act itself.

At page 3 of our former brief, we quoted the statute which creates a presumption that all sales are subject to the tax until the contrary is established. The dissenting opinions in the Supreme Court were based upon this provision of the law and upon the presumptions thus created. It is plain therefore that the judgment of the Court of Appeals does not interfere with the discretion of a public official, and it is equally plain that the writ is directed to the performance of an act which is especially enjoined by law. Without repeating the arguments of our former brief, we desire to call the Court's attention to our petition and brief where all of these matters are more fully discussed.

Opposing counsel have sought to make a feature of an earlier case involving in part the same facts but upon different issues in a different court and between different parties. That case was *State ex rel. Foster vs. Miller*, 136 O. S. 295. It is now contended that that case is *res judicata* of this present controversy. We are sure that if this present appeal were being argued by Mr. Linton, former counsel for one of these vendors and who did conduct the trial in the Court of Appeals and who later argued the case in the Supreme Court, were now conducting this appeal, he would not have raised that question. He would have remembered that which this record clearly shows that when this present suit was filed in the Court of Appeals, Mr. Linton pleaded *res judicata* and in support of it pleaded the case reported in 136 Ohio State. The Court of Appeals tried that issue in advance of the trial and the other issues in the case and found that it was not *res judicata* and no appeal was taken from that judgment and the question of *res judicata* became a finality. On this point we refer the Court to the opinion of the Court of Appeals and *especially to page 61 of the appendix to our former brief* at *the last paragraph of that page*. *Res judicata* as such was not even argued on the appeal to the Supreme Court of Ohio.

The respondent says:

> "A decision resulting in a deficiency * * * assessment * * * for the year 1935 could not have affected Judge Turner's interest * * * because the amount of gross sales would have remained the same (p. 12 Brief) * * * and his rental * * * the same."
>
> "A deficiency assessment might have reduced the net profits * * * but Judge Turner's rental being based on a percentage of gross sales, would not have been affected by a reduction of net profits." (p. 6 Respondent's Brief.)

That argument is ingenious. It is clearly established that their gross receipts from sales were augmented by mingling the tax collections with sales receipts, keeping no records and not accounting for the same. Judge Turner received in 1935 and every year thereafter, his monthly percentage of those taxes illegally withheld. If an assessment is made against Kroger it is then established that Judge Turner has been paid a share of those taxes. His decision and the judgment prevent the state from making an assessment therefor, where they refuse to keep records and the state cannot prove each specific sale, and cannot apply the rules and regulations lawfully adopted to meet such a situation.

Judge Turner's "conclusions" and the judgment prevent that.

If the assessment is made against Kroger, then Kroger would have an action against Judge Turner to recover that portion of the percentage paid him, which represents receipts or "net profits" so called, in excess of the amount received from the sale of merchandise.

Judge Turner, under such a situation, could not in good conscience retain that money. But his conclusions, decision and the judgment, admittedly, have resulted in stripping the state of all remedy to recover that money, or the amount represented thereby, in violation of the 14th Amendment, as pointed out in 281 U. S. 682, p. 2, our peti-

tion. This is the same principle set out in *Truax vs. Corrigan*, 257 U. S. 312.

Therefore, it is clear, a federal right of controlling importance was seasonably set up and argued, considered, and denied and that this Court does have jurisdiction. Therefore we believe this writ should be allowed.

Respectfully submitted,

MATTHEW L. BIGGER,
Attorney for Petitioner,
50 E. Broad St.,
Columbus, Ohio.

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PETITION FOR REHEARING.

MATTHEW L. BIGGER,
50 East Broad Street,
Columbus, Ohio,
Attorney for Petitioner.

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PETITION FOR REHEARING.

Comes now the above named Petitioner, and respectfully presents this Petition for a Rehearing of the petition for a writ of certiorari in this case.

I.

JURISDICTION.

The petition for certiorari was filed March 12, 1945, and was denied on April 23, 1945. This petition is filed before May 29, 1945, under rule made by this Court, and under Rule 33 (28 U. S. C. A., Sec. 354).

II.

REASONS FOR PETITION FOR REHEARING.

1. A re-examination and re-analysis of the petition and brief filed herein and of the material facts and applicable decisions, leads petitioner to the conviction that the real error underlying the action of the Supreme Court of Ohio establishing the right of the petitioner herein and of the jurisdiction of this Court has escaped this Court's attention.

Petitioner contended in the application for rehearing (p. 620 R.) in the Ohio Supreme Court and in the motions filed to vacate the judgment of the Supreme Court of Ohio —entered on August 9, 1944, that the action, decision and judgment, violated the 14th Amendment to the United States Constitution, by

1. Denying the petitioner due process of law;
2. By denying petitioner the equal protection of the laws.

The judgment of the Supreme Court of Ohio, on the application for rehearing became final on November 22, 1944 (pp. 906, 909 R.), and became final on the motion to vacate the judgment on December 20, 1944. (pp. 923, 906, 907, 910, 911, 973, 909 R.)

> "A federal question raised for the first time on motion to set aside judgment was in time."
>
> *Eads Brok. Co. vs. Ft. Scott*, 187 U. S. 547.

It is possible that in the statement of the case and in the brief, undue emphasis and probably unjustified emphasis, was given to the disqualification of Judge Turner on account of a pecuniary interest, as declared in *Tumey vs. U. S.*, 273 U. S. 510, 522-523, and other authorities cited.

It seemed to your petitioner that the admitted and undisputed facts of record with reference to the terms of the lease of Judge Turner to the Kroger Company did in fact render the judgment of the Supreme Court of Ohio void, and that because of that decision the State could not recover such tax money or assess a personal liability therefor when the vendor refused to keep records and account therefor, unless the state could prove each specific sale.

If, however, it be assumed that the court was a constitutional court and that the judgment was neither void nor voidable because of Judge Turner's disqualification, there is another and we believe a controlling ground of violation of the 14th Amendment, but which escaped this

Court's attention, or which was obscured in the statement of the case and argument in our original petition. Such specific claim was made in oral argument in the Supreme Court of Ohio. (p. 25 Petition for Certiorari.)

That claim was, and is, that the decision and the judgment of the Supreme Court of Ohio resulted in denying due process of law and of the equal protection of the laws by stripping the petitioner and the State of Ohio of all real remedy, for an injury done to it in its public revenue (arising out of the levy and collection by licensed vendors of sales taxes from the people). It cannot be questioned but that this additional question under the 14th amendment was presented to the Supreme Court of Ohio for consideration. *Copperwald Slade Co. vs. Ind. Com.*, U. S. Sup. Ct., L. Ed. Adv. Opinion Vol. 8, No. 13, pp. 928, 930.

In 136 O. S. 295, 303, *State ex rel. Foster vs. Miller et al.*, the Supreme Court of Ohio had declared that mandamus did not lie to compel licensed vendors of merchandise, charged with the duty of collecting sales taxes from the people, to pay such sales tax money into the State Treasury, because they "were not tax collectors—officers —agents or trustees of the state" and that the only remedy provided by law was an assessment by the Tax Commission for personal liability for the amount of taxes levied, collected and unaccounted for by cancellation of prepaid tax receipts.

The action in the instant case in the Court of Appeals was the seeking of a writ of mandamus to compel the performance of a specific duty, enjoined by the sales tax law, to make assessments for personal liability as provided by law, as stated in 136 O. S. 303.

It was stated by the Ohio Supreme Court and conceded by the Tax Commissioner that the remedy by assessment was the only remedy available to the State, or to the Tax Commissioner in the premises.

The complaint herein is predicated on the action of the Supreme Court of the State of Ohio taken at the end of the case. The petitioner no longer had opportunity to protect the state or add to the record and it follows that this Federal question was raised at the first opportunity, and it became a controlling question in the case, and the denial, of our claim that the State was stripped of all real remedy without opinion, was a denial of the Federal right, thus specifically set up.

Such action therefore under the applicable decisions of this Court became an additional basis for a petition for a writ of certiorari to this Court and established the jurisdiction of this Court, or,

It must, therefore, be true that a Federal question of great and far-reaching public importance has been presented by the petition and record, which has not heretofore been determined, but which should be determined by this Court.

It is claimed by all instrumentalities in Ohio, including associations of large vendors, chain stores and department stores, that as a result of the failure and claimed inability to enforce the sales tax law where the vendors fail to keep records, and have mingled the taxes with their sales receipts and where the state cannot prove each specific sale, as upheld by the Supreme Court of Ohio in its decision herein, that the State has lost and is losing from 5 to 8 million dollars each year. The Tax Commissioner stated this fact to the state Legislature in the past two months, in open session, the first time in 10 years, that this admission by the Tax Commission has been made. Other well-informed sources declared that such loss might be as much as 15 million each year, such as Col. Sherrill, former Kroger executive and City Manager of Cincinnati, O. It was admitted by Evatt, Tax Commissioner, page 842 R., that without this remedy to assess for personal liability the state had no remedy for such taxes collected and unaccounted for.

Taxes being the life blood of the state and nation (*DeBolt vs. L. Ins. Co.*, 1 O. S. 567) and being essential to its existence, and it being lawful to levy and collect taxes from the people by summary action for essential public purposes, when the levy is commanded as here, by express provision of the Ohio statute, then the tax is in effect reduced to the possession of the state. A remedy must exist therefore, and if denied it becomes a violation of the 14th Amendment (*DeBolt vs. L. Ins. Co.*, 1 O. S. 566-568, *Monongahela B. Co. vs. U. S.*, 216 U. S. 177, 195). No state has a right to collect taxes and give or abandon them to private individuals. *Olcott vs. Sup. etc.*, 16 Wall. (U. S.) 678, 689-694.

The denial of all remedy is made manifest by an examination of Section 5546-1 G. C., the initial section of the Retail Sales Act. We quote:

> "The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and * * *, no persons other than the state shall derive any benefit from the collection or payment of such tax."

The reasonable interpretation and plain import of this section is, that the tax is something separate and apart from the proceeds of the sale of merchandise, and that the vendor is required to collect the tax upon each sale and keep it as a separate account and upon such collection of the tax, he becomes an agent "for the benefit of the state." This matter is made the more emphatic in the last two lines of the section: "No person other than the state shall derive any benefit from the collection or payment of such tax."

We read the legislative mind to determine whether it was meant by that, that no vendor should illegally retain the tax and mingle it with his own funds, but it is at least capable of such interpretation.

All of these things being true, it clearly appears that the statute has provided a very definite remedy for enforcement of the act and for the payment of such taxes by the vendor as agent of the state into the State Treasury.

Those provisions of the statute are supplemented by Section 5546-9a which provides that the vendor "shall be personally liable for the amount" of such taxes and that "the commissioner *shall have power to make an assessment* against such vendor or consumer, *based upon any information within its possession* or that shall come into its possession," since the vendor has the absolute power and remedy in his hands to collect the tax.

This record shows by the sworn reports made by these two vendors and also by the audits made by the examiners employed by the Tax Commission, that there was a failure on the part of these two vendors to render a proper accounting. This is also clearly stated by Judge Turner in his opinion in this case.

Notwithstanding these clear-cut, definite remedies provided by the Legislature of Ohio, the Supreme Court has effectively stripped the State of Ohio and the Tax Commission of such remedy and therefore all remedy. It is to cure this action on the part of the Supreme Court of Ohio that we urge upon this Court a reconsideration of our petition.

It does not lie within the power of the state whether acting through its judiciary, legislative or executive departments to deprive one of all remedy for an injury done without violating the 14th amendment. It certainly does not lie within the power of the Supreme Court of the State, at the end of the case, when the party no longer has an opportunity to protect itself, or himself, or add to the record, for a court to strip such party of all remedy therefor, without there being available an appeal to this Court to protect the invasion of such right. Such action, this Court has declared, is arbitrary and capricious.

Saunders v. Shaw, 244 U. S. 317, 319, 320;
Missouria vs. Gehner, 281 U. S. 313, 320;
Brinkerhoof-Farris Co. vs. Hill, 281 U. S. 673, 677, 682;
Truax vs. Corrigan, 257 U. S. 312;
Chicago B. & Q. etc. vs. Chicago, 166 U. S. 226, 228;
Meyer vs. Richmond, 172 U. S. 82, 91;
St. Louis Con. C. Co. vs. Illinois, 185 U. S. 203, 206;
Manley vs. Park, 187 U. S. 547, 550.

A correct ruling thereon, in accordance with this Court's applicable decisions, on those constitutional and fundamental questions and guaranties under the 14th Amendment to the United States Constitution, applicable alike in all jurisdictions, would have resulted in a different conclusion.

III.

THE CONTROLLING QUESTION.

The Ohio Sales Tax Act provides for the levy of a tax on retail sales; fixes the rates; specifies the persons who should pay the tax; when and how the tax shall be paid; where it shall be paid; who shall collect the tax; that such collector shall keep records of all sales; that the tax collected is collected only for the benefit of the state; that such tax collector shall account for all taxes thus collected, and delegates to a lawfully constituted administrative body the power and duty of promulgating and adopting rules and regulations and administering and enforcing the law, both as against the taxpayers, the consumers of merchandise, and the tax collector, the vendors of the merchandise and prescribed the remedy to be pursued in enforcing, not only an accounting but the collection of the "personal liability" against the vendors as tax collectors. *Such remedy is reposed in the Tax Commission of Ohio and has been recognized by the Supreme Court of Ohio as the exclusive remedy*

prescribed by the Sales Tax Act against the vendor, the tax collector, to protect the State of Ohio in such public revenue. The controlling question therefore is whether the Supreme Court of Ohio has by its decision stripped the state and the Tax Commission of Ohio of the only remedy afforded by the Sales Tax Act, and whether by its refusal to enforce such exclusive remedy, there is a violation of the 14th Amendment to the United States Constitution. We think it is entirely clear, that vendors of taxable merchandise in Ohio who are constituted by the Sales Tax Act as collectors of taxes are agents and in a sense public officials, and being charged with the duty of keeping records of sales showing not only the amount of the sales of taxable merchandise, but also of the taxes which they have collected from the consumers of such merchandise that the *decision of the Ohio Supreme Court which places upon the State of Ohio the impossible burden of proving specific sales where no records have been kept by the vendors of such sales and collections of taxes result, in stripping the State of Ohio of all remedies which are clearly provided by the Sales Tax Act. It is in its nature and result arbitrary and capricious.*

The decision of the Court of Appeals in this case declared that upon the "information" then shown to be in the possession of the Tax Commission of Ohio there was sufficient information as provided in the statute upon which to levy an assessment upon these two vendors, thereby placing upon such vendors the burden of disproving the facts constituting such "information." This was in recognition of that provision of the Sales Tax Act (Sec. 5546-2 G. C.) which declares a presumption arising out of such information, from which the Court of Appeals declared, that the burden was upon the vendors to prove the accurate amount of taxable sales and incidentally the actual amount of taxes collected from consumers, and which had not been paid or accounted for to the State of Ohio. The Supreme Court of Ohio has completely reversed that situation and

has placed upon the Tax Commission the impossible burden of proving specific sales where the vendors kept no record of such sales as they were required to do by the provisions of the Sales Tax Act. It therefore rendered the law nugatory and stripped the State and the Tax Commissioner of the only remedy existing and provided by statute to protect the State in the public revenue arising from the *levy and collection* of this tax.

It, therefore, under the 14th amendment does become the *controlling question.*

IV.

PUBLIC IMPORTANCE.

The question thus raised and the right thus denied, is a matter of grave and far-reaching public importance.

Taxation is an attribute of sovereignty. The power to levy and collect taxes under our constitutional system, state and federal, has been delegated to the government. The power has been reposed in the Legislature, and Ohio Legislature has discharged its full duty. It has remained for its work to be nullified by the Ohio Supreme Court.

Since "every act required of public authorities has been done in the levy of this tax," nothing remained but the payment of the money. The vendors have failed to pay over the tax money thus collected.

Chief Justice Marshall in *McCullough vs. Maryland*, 4 Wheaton pp. 316, 425, first declared this fundamental truth:

> "The power to tax is of vital importance * * *"

And this Court said in *Prov. Bank vs. Billings*, 4 Peters 514, "The power is essential to the existence of government."

The power and duty specifically enjoined upon the Tax Commissioner, under the Sales Tax law and as upheld by the Court of Appeals, is governed by the following well-

known cases. *C. W. and Z. R. R. vs. Clinton,* 1 O. S. 88-94, cited in *Panama Ref. Co. vs. Ryan,* 293 U. S. 388, 421, 426. *Hampton Jr. vs. U. S.,* 276 U. S. 404, 408, 409, 412.

At the risk of this petition being drawn out to unreasonable lengths, we feel that we should cite and briefly comment upon two or three additional cases.

In *Mutual Film Company vs. Industrial Commission of Ohio,* 236 U. S. 245, this Court declared the rule for which we contend in a case involving the delegation of power to the Ohio Industrial Commission.

Another pertinent authority is *Union Bridge Company vs. United States,* 204 U. S. 364 at page 387. Again this Court was considering the question of a valid exercise of the delegation of legislative power.

In both of these cases, this Court declared that the principles involved were of great public importance because of the threatened stripping of the state and its commissions of all real remedies. It was declared in those cases that to do what the Supreme Court of Ohio has done herein, is "to stop the wheels of government, and bring about confusion and paralysis in the conduct of public business."

That this matter is of great importance is further evidenced by the fact, that since the filing of the original petition in this Court, there were a large number of bills introduced in the Ohio General Assembly relating to this subject matter.

Most of these bills were introduced or caused to be introduced by large vendor tax collectors or their registered lobbyists. Such bills sought either a destruction of the records upon which such assessments could be based or audits made, or they provided a limitation of action for an assessment for personal liability for failure to make accounting for such taxes levied and collected.

One bill, S. B. 218, introduced by Senator Metzenbaum, openly recognizing that the law was complete and that the

tax commissioner was enabled to make the assessments as adjudged by the Court of Appeals herein, but taking note of the decision of the Supreme Court herein, that the state could do nothing if vendors failed to keep records required by law and the state could not prove each specific sale, sought to amend the law to more specifically require each vendor to keep a record of each specific sale and the tax collected.

The Senate Taxation Committee continued hearings on that bill, until after this Court denied this petition herein. The large vendors apparently fearful that some court action might result in amending the law, professed to be in favor of such law. After the denial of the petition herein—such proposed amendment was promptly voted upon in committee adversely.

The Head of Sales Tax Division testified and stated before the committee that the state was losing from 5 to 8 million dollars each year, since 1935, by the principle declared by the Supreme Court of Ohio, herein, to enforce such law. He even admitted to a member of the Senate that he was estopped from making audits to protect the state by someone in the front office.

Most of these matters appeared in the public press of the state.

It was further openly stated that if the situation was not corrected, arising out of the effect of the decision of the Supreme Court of Ohio herein, that it would result in an amendment by an overwhelming vote to prohibit all excise taxes, sales taxes as well as others.

It must be clear, therefore, that the result of the action of the Supreme Court of Ohio, in stripping the state of all remedy for an injury done it, does violate the 14th Amendment and is a question of far-reaching public importance.

V.

We are encouraged to file this petition for rehearing and to earnestly pray that this Court allow the petition for certiorari upon such rehearing because we find that on a former occasion, to-wit, October 8, 1928, this Court denied a petition for writ of certiorari in the case of *Carnuth, etc., vs. United States,* 278 U. S. 607 and on November 18, 1928, upon a petition for rehearing being considered the same was granted, and the former order revoked and a writ of certiorari granted, 278 U. S. 594. That case was later heard on its merits by this Court, 279 U. S. 231, and at page 235, this Court stated:

> "We granted the writ of certiorari because of the far-reaching importance of the question."

That case involved the immigration laws, but we insist that that case was not of greater importance than the instant case.

VI.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration, the order of April 23, 1945, denying the petition for certiorari, be revoked and that a writ of certiorari issue.

MATTHEW L. BIGGER,
Attorney for Petitioner.

I, Matthew L. Bigger, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

MATTHEW L. BIGGER,
Attorney for Petitioner.